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IN THE

Supreme Court of the United States

October Term, 1963

167

No. [redacted]

ATLANTIC CITY, a municipal corporation of the State of New Jersey,

Petitioner,

v.

ANDREW CAPOROSSI,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1963.

No.

ATLANTIC CITY, A MUNICIPAL CORPORATION OF THE STATE OF NEW JERSEY,

Petitioner,

v.

ANDREW CAPOROSSI,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

Petitioner, Atlantic City, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit, entered in the above-entitled case on March 10, 1964.

CITATIONS TO OPINIONS BELOW.

The opinion of the District Court (R. 40a-80a) is reported at 220 F. Supp. 508 (1963), and is printed in Appendix B hereto, *infra*, p. 25. The opinion of the Court of Appeals, printed in Appendix A hereto, *infra*, p. 23, is reported at 328 F. 2d 620 (1964).

JURISDICTION.

The judgment of the Court of Appeals was entered on March 10, 1964. Appendix A, p. 24, *infra*. The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254(1).

QUESTIONS PRESENTED.

1. May a Federal court in a diversity case indulge in "re-analysis and re-evaluation" of "anciently venerated legal postulates" of applicable State court decisions in order to find that ownership and maintenance by a municipality of a public bathing beach bordering on the Atlantic Ocean is a "proprietary" activity outside the application of the State municipal tort immunity statute, R. S. 40:9-2, N. J. S. A., when the court admits that "there are no New Jersey cases which endow municipally owned public beaches or public parks with proprietary characteristics" and the State court of last resort has held that operation of beach parks is a governmental function?

2. May a United States court, in a diversity case, disregard State court holdings which, though not overruled by later State court decisions, are felt by the Federal court to be outmoded by change in time and circumstance?

STATUTES INVOLVED.

No municipality or county shall be liable for injury to the person from the use of any public grounds, buildings or structures, any law to the contrary notwithstanding. R. S. 40:9-2, N. J. S. A.

The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States in cases where they apply. Rules of Decision Act of 1948, c. 646, 62 Stat. 944, 28 U. S. C. § 1652.

STATEMENT OF THE CASE.

The respondent, Andrew Caporossi, instituted suit in the United States District Court for the District of New Jersey against the petitioner, City of Atlantic City, and others on July 19, 1961. The respondent, on August 24, 1960, while lawfully bathing in the Atlantic Ocean within the confines of the public beach park operated by the City of Atlantic City, had struck his head on some submerged pipes and sustained serious personal injuries. The primary defense of petitioner, set out in its Ninth Defense in its Answer (R. 162-182), was statutory immunity pursuant to R. S. 40:9-2, N. J. S. A.

Petitioner City of Atlantic City moved for a directed verdict at the close of plaintiff's case (R. 118a-6), the trial court reserving decision thereon (R. 118a-30), and at the close of all the evidence (R. 167a-31), upon the ground, *inter alia*, that:

> "* * * The Plaintiff's injuries were received by him from the use of public grounds operated by the City of Atlantic City in a governmental capacity or as a governmental function, and the plaintiff is therefore precluded from any recovery against the defendant City by virtue of and because of New Jersey statute annotated 40:9-2, with which Your Honor is undoubtedly familiar." (R. 167a-32)

The trial court, holding that operation of the beach park by the city was a proprietary function and that the statutory immunity did not apply, denied the Motion (R. 168a-11).

In addition, the petitioner requested the court to instruct the jury to return a verdict of no cause for action in favor of the City upon the same ground (R. 189a-5). The court refused to so instruct (R. 187a-7), and the defendant took exception thereto (R. 188a-20).

A Motion for J. N. O. V. or, in the alternative, for New Trial, predicated in part upon the same ground (R. 35a), also was denied in a written opinion which is set forth in full, *infra*, p. 25. The jury returned a verdict against the City of Atlantic City in the amount of $600,000 (191a-12). Neither the jury's finding of negligence by the City, nor its evaluation of the plaintiff's damages, is questioned here.

A timely appeal was taken and the District Court's ruling was affirmed by the United States Court of Appeals on March 10, 1964, *infra*, p. 24.

The relationship between the State of New Jersey and its municipal subdivision, insofar as beach parks are concerned, had its genesis in L. 1889, c. 129, § 1, p. 206, R. S. 40:179-78, et. seq. N. J. S. A., known as the Boardwalk Acts. Fourth class cities, as the seacoast cities were soon to be known, were thereby authorized to construct public walks along the beach or ocean front. By amendment, L. 1890, c. 107, § 1, p. 159, the Legislature provided that these walks might be elevated. Thus was the foundation laid for the famous Boardwalks. The primary object of this act "was evidently to secure pleasant promenades for pedestrians * * *." *Harris v. Atlantic City*, 73 N. J. L. 251, 62 A. 995 (Sup. Ct. 1906).

By L. 1894, c. 93, § 1, p. 146, R. S. 40:179-98, et. seq. N. J. S. A., the "Park Act," cities located on or near the ocean, and embracing within their limits any beach or ocean front, were authorized:

> "* * * to open and lay out on and along said beach or ocean front, a public park or place for public resort and recreation, and to devote the lands within the limits of such park or place of resort, when established as herein directed, to such use exclusively."

The Act went on to provide that whenever the governing body determined to lay out such a park, it had,

> "to devote the same exclusively for public use as a public park or place for public resort and recreation,

and to keep the same forever open and unobstructed for such public use." R. S. 40:179-100, N. J. S. A.

R. S. 40:179-102 made it lawful for the governing body to accept a dedication of lands lying within the park, and R. S. 40:179-103 gave authority to the governing body to regulate the use of the park and to prevent obstructions thereof, placed restrictions upon the use of the park lands, and expressed the legislative intention that the view of the ocean from the boardwalk "shall be free and open and unobstructed, and that no use shall be made of the said lands and property inconsistent with the purpose of this act."

Pursuant to the authority granted, the City of Atlantic City enacted a "Park Ordinance" on October 9, 1899 (R. 309a, Ex. D-5). In that Ordinance the City determined "to open and lay out a public park or place for public resort or recreation on and along the beach or ocean front of the city. In Section 3, it was ordained that all lands lying within the park

> "are hereby devoted to public use as a public park or place for public resort and recreation exclusively, and for such use shall be kept open and unobstructed forever, * * *" (R. 312a)

Most owners of land within the beach park dedicated those lands to the City around 1900 (R. 285a), thus making condemnation proceedings unnecessary. The City covenanted, *inter alia*, that the dedicated lands,

> "shall forever be and remain open so that the view oceanward from the said elevated public walks erected * * * shall be free, open and unobstructed and that no use shall be made of the said land by the grantee, its successors or assigns, inconsistent with its use as a public park or place for public resort and recreation." (R. 290a)

Thereafter, by P. L. 1903, p. 387, R. S. 12:3-33, N. J. S. A., the Legislature provided that when a municipality laid out a public park along the ocean, the municipality could then apply to the State Riparian Commissioners for a grant to the municipality of land under water within the limits of such park. In a Riparian Grant dated February 13, 1907, the State Riparian Commissioners, in consideration of the sum of $21,062.50, granted to the City all of the lands lying under water within the limits of the park (R. 302a, Ex. D-4). The grant provided:

> "The land * * * is granted and conveyed for park uses and purposes and none other, and shall be kept and maintained as an open public park or place for public resort and recreation, and that no building or other structures shall be erected on such park or on the lands under water hereby granted and conveyed inconsistent with its use as a public park or place for public resort and recreation; * * * and also provided that if at any time hereafter, such public park or the land under water hereby granted, shall cease to be used as such park or place for public resort and recreation, then and in that event, this grant, and all the right, title and interest in said lands under water thereby granted, shall cease, and determine and the lands * * * shall forthwith thereupon revert to the State." (R. 305a)

The Atlantic City Beach Park has at all times thereafter been open, without charge, to the public at large and to all people without regard to race, place of residence or any other consideration (R. 85a-3; 116a-8; 145a-23), and has been used by the public for a wide variety of recreational activities (R. 147a-40; 156a-12).

Atlantic City, upon laying out the beach park and receiving the Riparian grant, become a resort. The recreational and popularly conceived health-giving features of the City began to attract great numbers of people during

the summer months (R. 147a-5). Facilities and services had to be provided, thus posing financial difficulty for the City. The primary source of revenue was the real property tax, which eventually became "almost prohibitive" (R. 159a-29). The City was confronted with extraordinary influxes of people during the busy months, requiring enormous increases in municipal services such as police, fire protection, lifeguards, clean-up men and medical personnel on the beach (R. 149a-7; 156a-7). In addition, the Boardwalk and beach were damaged from time to time by storms, and were constantly under attack by the processes of erosion. The many measures taken by the State Legislature and the Federal Government to shore up the unstable economy of the great natural resource are set out in Appendix C, *infra*, p. 62. Express legislative recognitions of the problem were frequent:

> "An emergency is hereby declared to exist in municipalities bordering upon the Atlantic Ocean which are seaside or summer resorts and which because of their size have a great fluctuation in the number of visitors, because of the recent hurricane, the continued erosion of beaches and the danger of hurricane in the near future, all of which make it impossible for such municipalities to function normally as seaside or summer resorts during the next three fiscal years unless some additional revenue can be raised for use in providing and continuing the facilities which attract visitors to such municipalities as seaside or summer resorts." L. 1945, c. 156, p. 544, § 2, R. S. 40:48-8a, N. J. S. A.

> "Whereas, the Legislature, in furtherance of public policy, has for a period of years greatly enlarged municipal activities, principally in matters of public health and safety, with no consequent grant of revenue power to meet these modern and constantly expanding conditions;

Whereas, the sources of revenue in the various municipalities, particularly in Cities of this State bordering upon the Atlantic Ocean and being seaside or summer resorts, are inadequate and insufficient to meet existing municipal obligations; and

Whereas, many of these impositions are mandatory in character, and it is necessary and essential that such cities be given power to increase existing revenues; therefore". Historical Note, R. S. 40:48-8. 15 N. J. S. A.

A counter-balancing factor contributing to economic stability was the early case of *Bisbing v. Asbury Park,* 80 N. J. L. 416, 78 Atl. 196 (E. & A. 1910), holding the city immune from liability for personal injuries upon the public beaches. Since *Bisbing's* holding, supplemented by subsequent legislative enactment of R. S. 40:9-2, an act designed "to clarify the existing law as to the non-liability of counties, municipalities and school districts . . .", see *Schwartz v. Stockton,* 32 N. J. 141, 149, 160 A. 2d 1 (Sup. Ct. 1960), there has followed a sixty-six year history of immunity with no other reported cases arising from an injury upon any New Jersey beach, despite the fact that injuries thereon are so numerous as to require full-time medical stations, physicians, and other trained personnel at the Atlantic City beach alone (R. 62a-31).

REASONS FOR GRANTING THE WRIT.

I. The Court Should Grant Certiorari Because the Decision Below Significantly Affects One of the Great Natural Resources of the State of New Jersey and the Nation.

(a) Importance of Resource and Unstable Economy.

The determination of this case affects the legislative policy of the State of New Jersey and the economic stability of the Atlantic seacoast resort area. Ocean bathing and its related beach activities constitute leisure time attractions to a major portion of the Nation's population. Thirteen million persons are estimated to patronize Atlantic City each year (R. 346a). In 1947, Colonel F. F. Freech, District Engineer, concluded that "the resort business is the only substantial reason for the existence of the city" (R. 348a, 17-18).

Despite resort revenues, both the Federal and State governments have found it necessary to contribute large sums to perpetuate that existence.[1] Economic instability has been the history of the Atlantic resort area. Aside from the immense sums spent to prevent oceanic erosion of this vital natural resource, the State has repeatedly enacted legislative devices to save the resort economy from

(1) The State has participated in 10 or 11 beach protection projects in Atlantic City alone at a cost of approximately one million dollars. The Federal Government has contributed an equal amount to such projects in Atlantic City (R. 129a-134a; 142a-13). The State interest, and the interest of the public at large in the beach and its protection were recognized by the State Supreme Court in *State v. Atlantic City*, 23 N. J. 337, 129 A. 2d 293 (1957). See also, 33 U. S. C. A., § 426(e) for an expression of Congressional recognition of a national interest in the shores of the United States and the "healthful recreation of the people" thereon. And see, Federal Beach Erosion Control Study (R. 121a-25; Ex. D-10, 339a-355a) demonstrating the vital public interest at stake. For the State recognition of the same interest, see the reports of the New Jersey State Beach Erosion Commission (R. Supp. 1a, 5a).

bankruptcy.[2] These statutes, as shown in Appendix C, recognize the vital public interest in maintaining the area's stability. In addition, perhaps the most eloquent statement of currency is found in the 1950 Report of the New Jersey Beach Erosion Commission:

> "Coast protection warrants prominent standing in the general State budget. Since State revenues are considered general funds not earmarked as to source or use, and are appropriated annually for State functions deemed essential, coast protection must receive recognition befitting a modern-day problem of grave interest to the people and the government of New Jersey. . . .
>
> "The Recreation Industry, the name given shorefront business and recreational activity, is popularly said to be founded on the State's priceless natural assets of sand, sea, and sunshine. Its motivating credo of a better, fuller, healthier life for the people of New Jersey is symbolic of the social and business life of today. It is not only recognized as the greatest service industry in New Jersey, but also as the major industry in gross income as well as for its wide ramifications into diversified industrial life and business throughout the State. . . .
>
> "The continued prosperity of the Recreation Industry admittedly depends upon the existence and usability of the beaches and shorefront. The preservation of these physical assets in first class condition is essential to the welfare of the people of New Jersey." (R. Supp. Appendix 7a, 8a)

(b) Impact of Decision.

As has been seen, the Atlantic resort economy is an unstable one requiring periodic injections of massive State

(2) See Acts of 1922, 1931, 1936, 1945 and 1947 discussed in Appendix C hereto, *infra*, p. 62.

and Federal aid. The decision of the court below would remove the status of immunity from tort liability which has attended the beach park area for the past 66 years.[3] The significance of this in economic terms is staggering, particularly in view of the fact that ocean bathing is a hazardous activity. Innumerable accidents occur annually at the Atlantic City beach alone. The tremendous impact upon liability insurance coverage and premium increases should not be overlooked. Cf. *Weeks v. City of Newark*, 62 N. J. Super. 166, 182, 162 A. 2d 314 (App. Div. 1960). In addition, the City spends over $200,000 annually for beach maintenance and operation to protect against this hazard and to keep the area clean and attractive (R. 70a).

As stated in the opinion below:

> "(d) [The City] provided a complete unit of Beach Patrol Police; so-called "protected beaches" by the stationing of lifeguard stands and a trained lifeguard patrol with ranking officers, having care of the beach, the foreshore, and the ocean, with the use of life-saving equipment, such as boats, rafts, surf boards, respirators, life preservers and the like.
>
> (e) It provided a trained unit of beach personnel for the physical maintenance, care and cleaning of the beach surface, with appropriate supervisory personnel for inspections, such as the Captains of the Beach Patrol and the Commissioner of Public Safety.
>
> (f) It provided medical stations, with physicians and trained personnel, for injuries sustained by bathers and other users of the beach area, which

(3) Since 1894, when cities were enabled by the State Legislature to lay out public parks, there has been only one reported case arising from injury upon a New Jersey beach, *Bisbing v. Asbury Park*, 80 N. J. L. 416, 78 Atl. 196 (E. & A. 1910). Since *Bisbing's* holding of immunity for such injuries, there have been no further New Jersey cases despite annual drownings, shark attacks, and a variety of injuries upon clam shells, glass, pipes, timber and other debris—injuries so numerous as to require at Atlantic City Beach full-time medical stations, physicians, and other trained personnel (R. 62a-31).

> medical stations and personnel maintained a record of mishaps, injuries and medical assistance rendered, all of which were reported to appropriate municipal officers." *Infra*, p. 51.

With the advent of the "adequate" award in personal injury cases, one can easily see that sweeping aside immunity from the ocean beach area would result in destruction of the delicate economic balance which has been maintained through the combination of city revenues, immunity from tort liability, and outside aid. Such a drastic departure from the sixty-six year history of immunity requires the most careful scrutiny—especially when the departure results from a Federal court decision rather than that of a State court.

Where a question of immunity is involved, it is a matter of peculiar concern to the sovereignty of the State. Indeed, the federal policy of non-intervention is expressed by the Eleventh Amendment to the United States Constitution. *Ford Motor Co. v. Dept. of Treasury of Indiana*, 323 U. S. 459; *Smith v. Reeves*, 178 U. S. 436. That the federal judiciary would honor State policy in such matters has long been recognized:

> It must be conceded that this adjudication as to the liability of a city for injuries caused by a defect in the sidewalks, the repair of which it has both the power and duty to provide for, is not in harmony with the general rule in this country . . . nor in accord with the views expressed by this court . . . that 'the authorities establishing the contrary doctrine, that a city is responsible for its mere negligence, are so numerous and so well considered that the law must be deemed to be settled in accordance with them,' . . . But even if it were a fact that the universal voice of the other authorities was against the doctrine announced by the Supreme Court of Michigan, the fact remains that the

decision of that court, undisturbed by legislative action, is the law of that State. Whatever our views may be as to the reasoning or conclusions of that court, is immaterial. It does not change the fact that its decision is the law of the State of Michigan, binding upon all its courts, and all its citizens, and all others who may come within the limits of the State. *Detroit v. Osborne*, 135 U. S. 492, 498-99 (1890). See also, *Blaylock v. Muskogee*, 117 F. 125 (8th Cir. 1902); *City of Denver v. Porter*, 126 F. 288 (8th Cir. 1903).

II. The Court Should Grant Certiorari Because of the Questionable Application by the Court of Appeals of the Rule of Erie R. Co. v. Tompkins.

There Is a Division Among Circuits Concerning Whether a Federal Court May Disregard State Court Decisions Which, Though Not Overruled by Later State Court Decisions, Are Felt to Be Outmoded by Change in Time and Circumstances.

There is a division among the Circuits as to whether a federal court may anticipate a change in settled state law which has not yet been authoritatively announced by the state courts. Judge Frank has said that the test is,

> What would be the decision of reasonable intelligent lawyers, sitting as judges of the highest New York court, and fully conversant with New York "jurisprudence"? *Cooper v. American Airlines, Inc.*, 149 F. 2d 355, 359 (2d Cir. 1945).

In a contrary view, Judge Jones of the Fifth Circuit has said that to follow such a process "would be attempting to psychoanalyze state court judges rather than to rationalize state court decisions." *Polk County v. Lincoln Nat. Life Ins. Co.*, 262 F. 2d 486, 489 (5th Cir. 1959). The Court

went on to hold that a decision of the state court on the precise point in controversy in the federal court which clearly establishes the rule to be followed, is binding and conclusive upon the federal court. In such a situation, said the court, 262 F. 2d at 490:

> "We are not permitted to overrule a decision of the Supreme Court of Georgia on any theory that the Georgia Supreme Court, as presently constituted, would not be bound by what it had said when differently constituted some years ago. Nor can we apply, in diversity cases, a rule of stare decisis which permits us to weigh the degree of authority belonging to a precedent by its agreement with the spirit of the times. The Georgia courts can overrule their prior decisions. The Federal Courts cannot do so. Moore v. Illinois Central Railroad Co., 312 U. S. 630 . . ."

Also compare: *Mason v. American Emery Wheel Works*, 241 F. 2d 906, 908 (1st Cir. 1957) with *Nolan v. Transocean Air Lines*, 290 F. 2d 904 (2d Cir.), *cert. denied*, 365 U. S. 293 (1961). And see *Home Royalty Ass'n v. Stone*, 199 F. 2d 650 (10th Cir. 1952); *Jess Edward, Inc. v. Goergen*, 256 F. 2d 542 (10th Cir. 1958).

The older decisions of this Court clearly agree with the Fifth Circuit view. The repeated test is that a local decision must be followed unless "there is convincing evidence that the law of the State is otherwise." *Six Companies v. Joint Highway District*, 311 U. S. 180, 188 (1940) and,

> . . . the highest court of the state is the final arbiter of what is state law. When it has spoken, its pronouncement is to be accepted by federal courts as defining state law unless it has later given clear and persuasive indication that its pronouncement will be modified, limited or restricted . . .

> Even though it is arguable that the Supreme Court of Ohio will at some later time modify the rule of the West case, whether that will ever happen remains a matter of conjecture. *West v. American Telephone and Telegraph Co.*, 311 U. S. 211, 236-38 (1940). See also, *Fidelity Trust Co. v. Field*, 331 U. S. 169 (1940).

Again, the rulings of a State court of last resort must be taken as controlling "unless it can be said with some assurance that the [State] Supreme Court will not follow them in the future . . ." *Meredith v. Winter Haven*, 320 U. S. 228, 234 (1943). Some of the cases cited here have received criticism and the lower courts are in confusion as to the present rule of law-ascertainment under *Erie*. The instant case illustrates the confusion.

Here, the lower court refused to follow the express rulings and rationale of cases decided by New Jersey's court of last resort which have never been questioned by the New Jersey courts. In *Bisbing v. Asbury Park*, 80 N. J. L. 416, 78 A. 196 (E. & A. 1910), the highest court of New Jersey decided a case which is factually indistinguishable from the present case. The *Bisbing* case has been reaffirmed in cases decided in 1928[4] and in 1935.[5] The rationale of these cases has never been questioned and has been approved by the New Jersey Supreme Court as late as 1950,[6] 1957[7] and 1960.[8] The rule of these cases was made statutory by the State Legislature in 1933.[9]

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(4) *Kuchler v. New Jersey and N. Y. R. Co.*, 104 N. J. L. 333, 140 A. 329 (E. & A. 1928).

(5) *Martin v. Asbury Park II*, 114 N. J. L. 298, 176 A. 172 (E. & A. 1935).

(6) *Terranella v. Union Building & Construction Co.*, 3 N. J. 443, 70 A. 2d 753 (1950).

(7) *Cloyes v. Delaware Twp.*, 23 N. J. 324, 129 A. 2d 1 (1957).

(8) *Weeks v. City of Newark*, 62 N. J. Super. 100, 162 A. 2d 314 (App. Div. 1960), aff. o.b. 34 N. J. 250, 168 A. 2d 11 (1961).

(9) R. S. 40:9-2 N. J. S. A.

The lower court felt that a recent opinion by this Court furnished an escape from the line of New Jersey authorities just cited: "In *Bernhardt v. Polygraphic Co. of America*, 350 U. S. 198 (1956), a relaxing of the strict rule was suggested." *Infra*, p. 43.

The court felt that the indication of a relaxation in *Bernhardt* allowed it "to determine whether subsequent to *Bisbing* and *Kuchler*, there is judicial persuasion to convince this court how the highest New Jersey State Court would decide this question." *Infra*, at p. 44. This view was particularly important in view of the court's recognition that *stare decisis* would compel following the older *Bisbing* case and that the New Jersey Supreme Court has expressly refused to come to grips with the entire problem. Said the district judge:

> "In *Cloyes v. Delaware Twp.*, the Supreme Court . . . said:
>
> > 'We do not believe this is the case in which to consider whether to come to grips with the entire problem. . . .'
>
> This then is the posture of the New Jersey law on this issue. There are no New Jersey cases which endow municipally owned public beaches or public parks with proprietary characteristics. The next logical query involves the legal compulsion of this Court to apply the substantive holding of *Kuchler* which in turn relies on *Bisbing* which, in turn, relies on *Strader*." *Infra*, p. 42.

The court then looked toward more recent judicial developments, many of which occurred in other states, while ignoring completely the recent New Jersey case of *Terranella v. Union Bldg. & Const. Co.*, 3 N. J. 443, 70 A. 2d 753 (1950), which reaffirmed in *dictum* that the operation of a public park was subject to the immunity granted by R. S. 40:9-2,

N. J. S. A. See also, *Schwartz v. Stockton*, 32 N. J. 141, 160 A. 2d 1 (1960). The real basis for the lower court's refusal to follow the controlling New Jersey law was subsequently made clear:

> "When viewed against the panorama of legal history, it seems inevitable that even with quickened enlightenment, responsive changes came more slowly and often with tedious caution. This seems especially true in regard to anciently venerated legal postulates which justify their continued existence on the pragmatic needs of remote times and outmoded conditions rooted in ritualistic adherence to the doctrine of *stare decisis*. *Stare decisis*, while a valuable and well established doctrine, should serve as a flexible channel marker for guidance and not as an immovable sand bar which may cause disaster; it should not be permitted to foreclose re-analysis and re-evaluation of legal postulates, which may well have lost their vitalizing principle. If outmoded and artificial distinctions are to persist in confining a court of law to a choice of specific alternatives, one of which provides remedy for an injured individual, and the other does not, then the choice of remedy seems clear as the demands of justice must be obliged in each particular case.
>
> As was eloquently stated by Mr. Justice Holmes, commenting on 'The Path of the Law," in *Collected Legal Papers*, Oliver Wendell Holmes, p. 187:
>
> > 'It is revolting to have no better reason for a rule of law than it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since and the rule simply persists from blind limitation of the past.' " *Infra*, at pp. 48-49.

In choosing to find law which was not revolting to his conscience the court had to disregard the controlling New

Jersey law. The *Bisbing* case, *supra*, established a criterion regarding the New Jersey governmental proprietary classification that has never been challenged. That criterion is whether the function in question is one voluntarily assumed by the City as a consequence to permissive legislation from the State, or whether the function is "within the imperative public duties imposed on a municipality as agent of the State . . ."[10] A further embellishment of the criterion is whether the activity benefits the public as a whole or only the local citizenry.

The *Bisbing* case is not only factually indistinguishable, but the same arguments unsuccessfully urged by the plaintiff in that case are the arguments adopted by the lower court in its opinion in the instant case. In *Bisbing*, the defendants' alleged negligence was set forth in the plaintiff's declaration:

> "That the defendant, a municipal corporation, was subject to . . . the duty . . . of keeping sound, safe, and serviceable for public use all of the parks and public places except the streets and avenues in said City of Asbury Park, and particularly the public place known as the beach front lying east of Ocean Avenue * * * Yet, the defendant did not keep said public place known as the beach front * * * sound, safe, and serviceable for public use and travel." 80 N. J. L. at 448, 78 Atl. at 197.

The plaintiff had tripped in a hole under an exposed water pipe located on the grounds adjacent to the ocean boardwalk and part of the public park. In rejecting the plaintiff's arguments the Court adopted a rationale which has never been questioned by the courts of New Jersey:

> "In keeping up the public grounds, the agents of the City were fulfilling a corporate duty imposed by law

(10) *Weeks v. City of Newark*, *supra*, 62 N. J. Super. 166, 181, 162 A. 2d 314, 323 (App. Div. 1960).

> . . . a governmental act, and not the exercise of a power conferred for its own benefit." 80 N. J. L. at 424, 78 Atl. at 199.

Perhaps more important, the court expressly rejected the arguments adopted by the lower court in the instant case. The argument was that since the City derived substantial direct economic benefit from the use of the public property, the whole of the property should be regarded as being used in a proprietary capacity (an argument, incidentally, which is inapplicable as to the Petitioner [R. 157a-38; 97a-24; 157a-13; 157a-24):

> "But it also appears in the case that . . . there were constructed piers, pavillions, bath houses, a restaurant, soda water stands, novelty stands, and other buildings owned by the City and from which the city, by way of rents, commissions, charges, and bathing privileges, derived a revenue. It as well also was in receipt of a revenue from ground rents for portions of said grounds, for rolling chair privileges, weighing machines, telescopes, and charges for the privilege of going to a place of landing of a sailing yacht.
> By reason of the income . . . the City becomes liable, it is said . . . hence the insistence is that the defendant was managing and dealing with this whole property as a private owner would, and that it was held by the City for its own advantage and profit . . ." 80 N. J. L. at 422, 78 Atl. at 199.

However, the Court rejected this argument pointing out that the legislation pertinent to the ocean front required the use of this property as a public resort for all the citizens, that it was a duty imposed by law, and that any portion of the property which was public property and not being used directly in a proprietary function would be immune from tort liability. The fact that the lower court

adopted the same arguments rejected in *Bisbing* may be readily seen from a cursory reading of the Court's opinion. *Infra*, p. 25.

The *Bisbing* criterion was reaffirmed in *Kuchler, supra*, in 1928 (which the lower court also regards as no longer valid law in New Jersey), and was specifically affirmed in identical rationales in the two decisions of *Martin v. City of Asbury Park*, 111 N. J. L. 364, 168 Atl. 612 (E. & A. 1933); 114 N. J. L. 298, 176 Atl. 172 (E. & A. 1935). In the 1933 *Martin* decision, the court found that where the City was lessor of a bath house which was negligently maintained resulting in the plaintiff's fall on slippery steps, the function of that particular portion of the property was proprietary and the City might be sued. This rationale of course was precisely that adopted in *Bisbing*. In 1935, the second *Martin* decision again cited *Bisbing* with approval and pointed out that the appropriate legislative acts demonstrated the special status of seaside resorts to the general public use, imposing an imperative duty upon the cities to use the property for such a purpose. In *Martin*, the question of immunity turned upon whether the portion of the property where the accident occurred was being used in a proprietary capacity. Since the City of Asbury Park there occupied the status of an ordinary landlord, the activity was regarded as proprietary, one in which a private individual could engage as well as the City. But in *Bisbing*, the accident occurred on public grounds which were not being used in a proprietary activity. In this respect the instant case (involving an accident upon the ocean beach itself) is precisely analogous to the *Bisbing* accident occurring upon a portion of the grounds adjacent to the boardwalk. *Bisbing* and *Martin* would both allow recovery in the instant case if the injury, for example, had occurred in a hotel located on property leased from the City. But the injury did not occur in such circumstances and thus under *Bisbing* and *Martin* there would be no liability.

The two cases relied upon by the lower court as an indication of departure from the earlier rationale (*Cloyes v. Twshp. of Delaware, supra,* and *Weeks v. City of Newark, supra*), actually reaffirmed the instant rationale and in no way questioned its applicability in the present situation. In *Cloyes,* Chief Justice Weintraub said: "The courts declined to extend the concept of governmental immunity to new areas of activity while tending to adhere to it in the areas in which it had been established." 23 N. J. at 329, 129 A. 2d at 3. The court, in finding liability in *Cloyes,* noted that the municipal operation of a sewage disposal plant was proprietary because this was not an ancient function of government, was still operated by private utilities in some places, and the legislation allowing municipal operation of sewage disposal plants was permissive and not mandatory. Application of these criteria is in no sense a departure from the criteria followed in the *Bisbing* and *Martin* cases.

Finally, in the latest articulation of the New Jersey court, *Weeks v. City of Newark, supra,* so heavily relied upon by the District Court, the rationale expressed was precisely in line with that established in *Bisbing* and *Martin.* In finding the operation of a municipal swimming pool proprietary, the court said:

> "The operation of a swimming pool is an activity which a municipality provides for its citizens more as a matter of local convenience than in the exercise of some duty discharged on behalf of the State with consequent benefits accruing to the State as a whole. It is a service which could just as well be provided by a private corporation, and very often is." 62 N. J. Super. at 180, 162 A. 2d at 322.

The *Weeks* decision did not even mention the *Bisbing* case and its result is entirely in accord with the criteria established in *Bisbing, Kuchler* and *Martin, supra.* Further, its analysis exposes the obvious distinction between

a municipal swimming pool intended for local use and the Atlantic City beach which attracts the public of the nation and which has been the subject of so much State and Federal aid.

CONCLUSION.

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

SAMUEL P. ORLANDO,
Counsel for Petitioner.

GEORGE W. SHADOAN,
On the Petition.

APPENDIX A.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT.

No. 14,661.

ANDREW CAPOROSSI

v.

ATLANTIC CITY, A MUNICIPAL CORPORATION OF THE STATE OF NEW JERSEY;

LESTER WARREN, INC., A CORPORATION OF THE STATE OF NEW JERSEY, AND MOLLIE GERBER AND SHEPARD GERBER,

ATLANTIC CITY, A MUNICIPAL CORPORATION OF THE STATE OF NEW JERSEY,

Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY.

Argued February 20, 1964.

Before KALODNER and HASTIE, *Circuit Judges*, and KIRKPATRICK, *District Judge*.

OPINION OF THE COURT.

(Filed March 10, 1964.)

PER CURIAM:

On review of the record we find no error. The judgment of the District Court entered pursuant to the jury's verdict will be affirmed for the reasons so well stated by Judge Cohen in his excellent opinion reported at 220 F. Supp. 508 (D. C. N. J. 1963).

JUDGMENT OF THE UNITED STATES COURT OF APPEALS.

This cause came on to be heard on the record from the United States District Court for the District of New Jersey and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment filed June 6, 1963 in favor of the plaintiff, Andrew Caporossi, and against the defendant, Atlantic City, a municipal corporation of the State of New Jersey, be, and the same is hereby affirmed, with costs.

Attest: IDA O. CRESKOFF,

March 10, 1964. Clerk.

APPENDIX B.

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY.

Civil 581-61.

ANDREW CAPOROSSI,

Plaintiff,

v.

ATLANTIC CITY, A MUNICIPAL CORPORATION OF THE STATE OF NEW JERSEY, AND LESTER WARREN, INC., A CORPORATION OF THE STATE OF NEW JERSEY,

Defendants.

OPINION.

(Filed 8/7/63.)

COHEN, *District Judge:*

This is a motion for judgment notwithstanding verdict,[1] and in the alternative for a new trial,[2] by the defendant, Atlantic City, a municipal corporation of the State of New Jersey, subsequent to a trial by jury and a verdict in favor of the plaintiff, Andrew Caporossi. Appropriate motions during trial were made by this defendant for a directed verdict, or judgment of involuntary dismissal, on all claims for damages asserted by all parties against it, which were denied. In addition to the legal, factual and argumentative bases advanced by defendant at time of trial, which it renews and commingles with its present motion, it urges

(1) Fed. R. Civ. P. 50, 28 U. S. C. A. 2071, properly to set aside the verdict after trial.

(2) Fed. R. Civ. P. 59, 28 U. S. C. A.

specifically that the verdict of the jury was contrary to law, and against the weight of the evidence; that the amount of damages awarded was excessive; and that the actions of the court in failing to charge certain requested instructions and in ruling on motions of the codefendants constitute fatal judicial error warranting a new trial.

While many of the reasons assigned by the Court orally, in its disposition of certain motions at time of trial, are equally applicable now, the magnitude as well as the complexity of the legal issues presented and upon which it is compelled to rule as matters of law, requires renewed consideration and enunciation of its conclusions.

This litigation, grounded in tort for personal injury and based upon diversity of citizenship and jurisdictional amount,[3] was instituted by plaintiff, Andrew Caporossi, a citizen of New York, against defendants, the city of Atlantic City, a municipal corporation of the State of New Jersey, Lester Warren, Inc., a New Jersey corporation, which operated the Commodore Hotel in Atlantic City, and Mollie[4] and Shepard Gerber, citizens of New Jersey, who owned and operated a parking lot in Atlantic City. The plaintiff alleged negligence and nuisance against the defendants who asserted cross-claims among themselves.

At the conclusion of the plaintiff's proofs, and again at the conclusion of the entire case, all defendants moved for judgments of involuntary dismissal and directed verdicts, charging failure of the plaintiff to establish a *prima facie* case against each of them, in that no issue of fact existed for the jury's resolution, and that consequently as a matter of law their motions should have been granted.

On such motions made at the end of the plaintiff's case, it is axiomatic that the trial judge must accept as

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(3) 28 U. S. C. 1332.

(4) Defendant Mollie Gerber died, *pendente lite*, which fact was noted on the record, and the trial proceeded against defendant, Shepard Gerber, as the surviving tenant by the entirety.

proof all evidence supporting the position of the plaintiff, and must give him the benefit of all inferences that may logically and legitimately be drawn therefrom.[5] And again where any of the evidence would cause fair-minded men to differ, the issue is one for the jury's determination. Likewise, in passing upon a motion for judgment notwithstanding the verdict, or more properly to set aside the verdict, it should not be granted if the evidence produced at trial was sufficient to present a jury question, or if the verdict is supported by substantial evidence.[6] Whereas, on the motion for a new trial, though similar problems are involved, such a motion is addressed to the sound judicial discretion of the trial court, and it may only be granted where, despite substantial evidence, the verdict is clearly against the weight of the evidence, or is based upon evidence which is false, or would result in a miscarriage of justice.[7]

So viewed, and having in mind these salutary principles, the testimony is considered.

On August 24, 1960, the date of the injury herein, and for many years prior thereto, the defendant, Atlantic City, owned, operated, maintained, and controlled a public bathing beach within the confines of the city, bordering on the Atlantic Ocean, to which members of the public were invited. The portion of the beach in question lies at the foot

(5) Hayden v. Curley, 34 N. J. 420, 422, 169 A. 2d 809 (1961); California Fruit Exch. v. Henry, 89 F. Supp. 580, (W. D. Pa. 1950); Sattler v. Great Atl. & Pac. Tea Co., 18 F. R. D. 271, (W. D. La. 1955).

(6) Schrader v. Prud. Ins. Co. of Amer., 280 F. 2d 355, (5 Cir. 1960); Shreve v. Hof Shoppes, Inc., 184 F. Supp. 436 (D. C. 1960), aff'd. 292 F. 2d 761, 110 U. S. App. D. C. 268; Moffett v. Arabian Am. Oil Co., 85 F. Supp. 174, (D. C. N. Y. 1949), aff'd. 184 F. 2d 859, (2 Cir.), cert. den., 71 S. Ct. 533, 340 U. S. 948, 95 L. Ed.; Weinzen v. Penna. R. Co., 143 F. Supp. 360, (D. C. Pa. 1956); Richfield Oil Corp. v. Karseal Corp., 271 F. 2d 709, (9 Cir. 1959); cert. den., 361 U. S. 961, 80 S. Ct. 570, 4 L. Ed. 543.

(7) *Cloyes v. Dalaware Twp.*, 23 N. J. 324, 129 A. 2d 1 (1957), 1943), citing extensive authorities and cases.

of St. Charles Place between the Garden Pier and the Steel Pier, known as the Delaware Avenue section. This is a highly populated area, serviced by multitudinous hotels, many of which were supplied with pipe lines conveying salt water from the ocean to these hotels providing salt water baths for their guests. In the event of abandonment, fire, or other reasons for disuse, the pipes, referred to throughout the testimony as dead "pipes", were exposed and protruded, above the sand, but below the surface of the ocean, constituting a known dangerous condition and an admitted hazard to bathers.

The Commodore Hotel owned and operated by the defendant, Lester Warren, Inc., is situated on the northerly side of Pacific Avenue, facing St. Charles Place, the boardwalk, and the beach. Gerbers' parking lot, formerly the new Davis Hotel destroyed by fire in 1952 and acquired by them in 1954 after *mesne* conveyances, is located on the easterly side of St. Charles Place, between Pacific Avenue and the boardwalk.

In March, 1944, pursuant to a resolution of the defendant City, a permit was issued to the then owner of the New Davis Hotel, Rose Fleischer, for the installation of salt water intake pipes, leading from the ocean to the said hotel. One terminal of these pipe lines, in disuse since 1952, was located on the beach at St. Charles Place, and for a considerable period of time prior to the occurrence of August 24, 1960, was exposed, the extent of the exposure varying with the height of the tide; at times completely exposed, at others partially exposed, and at still others completely submerged in the ocean entirely invisible to public bathers. The hazardous condition created by the presence of these pipe lines on the beach was known to the beach personnel and to at least two of the City Commissioners, as well as to many other employees of the City.

The many pipe lines on the beach, and specifically the one in question, resulted in injuries of various kind and degree to lawful bathers almost daily. Such occurrences

were reported to and acknowledged by the employees and officials of Atlantic City. Despite these circumstances, these pipes remained without safeguards or other precautionary measures and without any warning signs whatsoever. Recommendations for their removal, prior to the accident, were repeatedly made and as often refused. However, after the incident giving rise to the plaintiff's cause of action, the pipes, belatedly, were removed. Evidence of their removal was proper since control of same was in issue.

Although no charge was made by the City to persons using the beach, luxury taxes were imposed upon hotels and merchants which were passed on to guests and consumers, of $1,797,457.4 for the year 1959, and $1,781,531.07 for 1960, resulting in economic benefit to the City. In furtherance of its endeavors to solicit and attract people to the resort, the City for many years advertised extensively in newspapers, national magazines, on television and radio as far west as Kansas City, up to Canada and down into the South appealing to one-third of the national population to use its beach. The City maintained its own public relations department and employed the services of the Dorland Advertising Agency to whom it paid, in 1959, the sum of $206,587.96 and, in 1960, the sum of $197,243.26.

Shortly prior to August 24, 1960, the plaintiff and his prospective bride, seeking to spend their honeymoon in Atlantic City, communicated with the Commodore Hotel, owned and operated by defendant, Lester Warren, Inc., requesting information concerning its facilities. In response the plaintiff received a brochure, the design of which was authored by the President of the defendant hotel-corporation. The brochure listed "free surf bathing from hotel to beach" as one of its features. It also contained a map of the hotel in relation to the beach, as well as a picture of persons bathing in the surf. The plaintiff sent a money order to the hotel in August, 1960, making reservation for himself and his fiancee, commencing August 23, 1960. After

marriage they arrived on August 23, 1960, at 6:00 P. M. and registered at the Commodore Hotel. That evening they attended Steel Pier, an amusement pier situated on the boardwalk abutting the beach. On August 24, 1960, about 4:00 P. M., they prepared to go to the beach; neither had ever been there before, nor were they aware of its site. Upon checking his valuables with the Room Clerk, the plaintiff made inquiry as to the location of the hotel beach and was directed to walk down St. Charles Place, which the plaintiff and his wife proceeded to do. Upon arrival at the beach, they selected a location and placed a blanket on the sands, near a lifeguard stand. Shortly thereafter, the plaintiff and his wife entered the ocean and after a few minutes of splashing at each other playfully, the plaintiff trod into the surf and dove into an incoming wave. His head struck a submerged object. A pool of blood appeared on the water's surface at the site of the plaintiff's entrance into the surf and at the location of the pipe in question; after calls for help, lifeguards and others ran into the surf, removed the plaintiff therefrom, and summoned medical assistance. The plaintiff sustained severe and permanent injuries to his spine and spinal cord, resulting in quadriplegia.

At the conclusion of the evidence, the motion for dismissal of defendant, Gerber, was granted on the ground that there was insufficient testimony upon which liability in negligence or nuisance could be predicated on either fact or law.[8] The most that was proved was a record easement for the laying of the pipes, which easement was not within 50 years of defendant's chain of title of record. Actual

(8) Lambe v. Reardon, 69 N. J. Super. 57, 64, 173 A. 2d 520, 525, (App. Div. 1961): "A plaintiff does not make out a *prima facie* case against an abutting owner merely by putting in proof of the existence of a nuisance, and he cannot thereby throw upon the owner the burden of establishing that neither he nor his predecessor in title is responsible for its creation or continuance." (citations omitted) On the contrary, plaintiff has the burden of proving that the owner or his predecessor in title was responsible therefor.

knowledge was categorically denied by the defendant, and remained uncontradicted. The motion of defendant, Lester Warren, Inc., the owner-operator of the Commodore Hotel, was taken under advisement by the Court, and the question of its negligence together with that of defendant, Atlantic City, was submitted to the jury. The jury ultimately returned a verdict for plaintiff in damages in the amount of $600,000.00 against defendant, Atlantic City, and a verdict of no cause for action in favor of defendant, Lester Warren, Inc. Thereafter, the motions of defendant, Lester Warren, Inc., directed to plaintiff's claim and to the cross-claim of defendant, Atlantic City were granted by the Court.

In contravening the plaintiff's claim for damages for injuries sustained as a proximate result of defendant Atlantic City's negligence in operating a public beach, or on the basis of the maintenance of a nuisance, defendant interposed by pleading and argument of its motion that as a municipal corporation it is immune from tort liability under common law principles and by statute conferring such immunity, *Revised Statutes of New Jersey Title* 40:9-2, *N. J. S. A.*, which reads as follows:

> "No municipality or county shall be liable for injury to the person from the use of any public grounds, buildings or structures, any law to the contrary notwithstanding." (L. 1933, c. 460, approved Jan. 10, 1934.)

Defendant concedes that if injury to a person results from the use of "any public grounds, buildings or structures" which is devoted to a proprietary activity, as distinguished from governmental, there is no statutory immunity against municipal tort liability and common law principles apply; but contends that if the function is governmental, then under statutory immunity there is no liability whether the alleged tort is based upon simple negligence, active wrongdoing, or nuis.... e.

The primary thrust of defendant's argument is that the area involved in this case is that of a "public park", hence within the language of the immunity statute in question, in that it is within "public grounds" therein enumerated. In support of this contention defendant places great reliance upon the character of the land in question, beach front property, as being determined by the nature of its acquisition, conditioned upon its purpose and use as a "public park, or place for public resort and recreation." By its Charter Provisions (P. L. 1854 p. 278) the territorial limits of Atlantic City extend into the Atlantic Ocean to the exterior line of the State's riparian jurisdiction. Pursuant to permissive but not mandatory legislative authority, (P. L. 1894 c. 93, R. S. 40:179-98, et seq. N. J. S. A.) the defendant, on October 13, 1899, passed a municipal ordinance "to lay out and open a public park or place for public resort and recreation along the beach or ocean front of Atlantic City, establishing the interior or inland line of such park or place of public resort and recreation, and the limits and boundaries thereof, and providing for the issuing and sale of bonds to defray the costs, damages and expenses incurred in the opening and laying out of such park and acquiring the lands, property and rights necessary therefor, and for the assessment of property benefited thereby." The ordinance further provided for the condemnation of lands desired by the municipality for such public purpose which were not so dedicated by the private owners thereof. To avoid condemnation proceedings by the municipality the then private owner of the beachfront area here in question, now known as St. Charles Place, a James B. Riley, joined with other beachfront owners, and by deed dated February 6, 1900 conveyed to defendant municipality "all their and each of their right, title and interest, in and to the above described tract of land (embracing the area in question) and every part and parcel thereof, including such parts and parcels thereof as are or may be covered by water." There was reserved to the

grantors, their heirs and assigns, the right to lay beneath the surface of their respective lands so conveyed, a pipe or pipes from their remaining and adjoining lands to and into the ocean for the purpose of obtaining and conveying sea water to their lands.

Thereafter, and pursuant to the Act of April 8, 1903 which was a supplement to the Act of April 11, 1864, defendant on February 13, 1907 secured a riparian grant from the State of New Jersey Riparian Commissioners, for lands under water lying between the highwater line of the westerly shore of Absecon Inlet and the exterior lines established by the Riparian Commissioners, and for lands under water lying between the highwater line of the Atlantic Ocean and the exterior line as established by the Commission, which included the area in question. This riparian grant was made expressly subject to a prior grant by the State of New Jersey, through its Riparian Commissioners, to the United States of America on August 17, 1878. Further, the grant to the municipality provided that should public purpose cease, the lands were to revert to the State.

Such then was the title of defendant, Atlantic City, when in 1944 it issued a permit for the laying of salt water intake pipes to Gerbers' predecessor in title, pursuant to a "Resolution" of its Board of Commissioners, which resolution provided, *inter alia*, for the laying of pipes and intakes at sufficient depth under the sands of the "public park" so that neither pipe nor intakes shall protrude above the beach; that the permitee was to assume sole responsibility for damage to street construction or to the public using the beach caused by the same becoming uncovered on the beach; and that such permitee was to post bond to assure all repairs, and to lower the pipe line when such were necessary "to protect the public property and people using the beach." No grant of easement of record was ever properly lodged to give notice of such resolution or

construction permit which would appear upon a search of the title to the lands in question.

Defendant, Atlantic City, strenuously argues that the Court departed from the obligatory duty imposed upon it by the Federal Rules of Decision Act (28 U. S. C. 1652), as interpreted by *Erie &c. v. Tompkins*, 304 U. S. 64, 58 S. Ct. 817, 82 L. Ed. 1188, 114 A. L. R. 1487 (1938), and by subsequent United States Supreme Court decisions, in holding that the city in its operation of "the beach park" was engaged in a proprietary function, and in refusing to base its determination of the substantive law of New Jersey on the decisions of the New Jersey Court of last resort, as then constituted, in *Bisbing v. Asbury Park*, 80 N. J. L. 416, 78 A. 196 (E. & A. 1910), and *Kuchler v. N. J. & N. Y. R. R. Co.*, 104 N. J. L. 333, 140 A. 329 (E. & A. 1928), which cases it contends hold that the operation of a "public park" is a governmental function.

The legal compulsion to apply state substantive law under the Federal Rules of Decision Act,[9] and as developed by the United States Supreme Court since *Erie*, is well established in diversity actions in the Federal District Courts.[10] In such actions, as here, the Federal District Court is but another forum of the state courts and is compelled to make such determination as would a state court on the precise issue presented to it.[11] Its function is not to speculate as what the law will be in the future, or apply a

(9) 28 U. S. C. 1652: "The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply." June 25, 1948, c. 646, 62 Stat. 944. Based on Title 28 U. S. C. 1940 ed., sec. 725 (R. S. sec. 721); Judiciary Act of 1789, sec. 34.

(10) Nolan v. Transocean Air Lines, 365 U. S. 293, 81 S. Ct. 556, 5 L. Ed. 2d 572 (1961); King v. Order of Travelers, 333 U. S. 153, 68 S. Ct. 488, 92 L. Ed. 608 (1948), and see notes (12) and (13) post.

(11) Hausman v. Buckley, 299 F. 2d 696 (2 Cir., 1962), cert. den. 369 U. S. 885, 82 S. Ct. 1157, 8 L. Ed. 2d 286.

rule of law which it considers better or wiser.[12] And conversely, the Federal District Court in a diversity case must accept a binding ruling of the state court of last resort, or lacking such, its intermediate appellate courts, even though in its opinion it is an erroneous one.[13] As was stated in *West v. Amer. T. & T. Co.*, 311 U. S. 223 (1940) at pp. 236, 237:

> "True, as was intimated in the *Erie Railroad* case, the highest court of the state is the final arbiter of what is state law. When it has spoken, its pronouncement is to be accepted by federal courts as defining state law unless it has later given clear and persuasive indication that its pronouncement will be modified, limited or restricted. . . . But the obvious purpose of Sec. 34 of the Judiciary Act is to avoid the maintenance within a state of two divergent or conflicting systems of law, one to be applied in the state courts, the other to be availed of in the federal courts, only in case of diversity of citizenship. That object would be thwarted if the federal courts were free to choose their own rules of decision whenever the highest court of the state has not spoken.
>
> "A state is not without law save as its highest court has declared it. There are many rules of decision commonly accepted and acted upon by the bar and inferior courts which are nevertheless laws of the state although the highest court of the state has never passed upon them. In those circumstances a federal court is not free to reject the state rule merely because it has not received the sanction of the highest state

(12) West v. Amer. T. & T. Co., 311 U. S. 223, 61 S. Ct. 179, 85 L. Ed. 139 (1940).

(13) Montgomery Ward & Co. v. Morris, 273 F. 2d 452 (8 Cir., 1960); Hausman v. Buckley, *ante*.; West v. Amer. T. & T. Co., *Ante*.; Six Companies of California v. Highway Dist., 311 U. S. 180, 61 S. Ct. 186, 85 L. Ed. 114 (1940); Fidelity Trust v. Field, 311 U. S. 169, 61 S. Ct. 176, 85 L. Ed. 109 (1940).

court, even though it thinks the rule is unsound in principle or that another is preferable. State law is to be applied in the federal courts as well as the state courts and it is the duty of the former in every case to ascertain from all the available data what the state law is and apply it rather than to prescribe a different rule, however superior it may appear from the viewpoint of 'general law' and however much the state rule may have departed from prior decisions of the federal courts."

In any consideration of the effect of the immunity statute upon the state of the law, which must bind and guide a court called upon to make a determination of the existence of municipal liability or immunity in tort law, resort must be made, of necessity, to the original historical development of the substantive law of New Jersey in order to ascertain the present law to be applied in the particular case.

At the outset it should be understood that although the statute imports to grant blanket immunity to municipalities in its operation of public buildings, lands, etc., the New Jersey courts have interpreted this immunity to apply only when a governmental function is being performed on the premises in question.

Thus, we are confronted with the query of whether the ownership and maintenance or operation by the municipality of the public bathing beach in Atlantic City, bordering on the Atlantic Ocean, was activity within the classification of governmental capacity and function, for the purpose of determining immunity or non-immunity in tort law.[14]

(14) The origin of the doctrine of governmental immunity is steeped in the early history of England on the rudimentary theory that "the King can do no wrong." The balancing of the concept of such sovereign immunity against the right of the injured individual gave rise in judicial decisions to artificial distinctions, such as governmental and proprietary functions, in order that a wrong should not be without judicial remedy. Such cases seem irreconcilable on the basis of

The historical inception of the municipal immunity problem is stated in *McAndrew v. Mularchuk*, 33 N. J. 172, 190-191, 162 A. 2d 820, 830 (1960):

> "The general thesis of municipal immunity traces back to the 1788 English case of *Russell v. The Men of Devon*, 2 *Term. Rep.* 667, 100 *Eng. Rep.* 359 (K. B. 1788). At that time 'the idea of the municipal corporate entity was in a nebulous state and the action was in effect against the population of a whole county.' The decision was predicated on lack of precedent to sustain the action, fear of a multitude of such actions and the absence of funds in the treasury to be used in payment of judgments arising out of tort claims. (Citation of authorities omitted.) In such a situation Judge Ashurst, speaking for the Kings Bench in *Russell*, said, 'that it is better than an individual should sustain an injury than that the public should suffer an inconvenience.' 100 *Eng. Rep.*, at *p.* 362. How the courts of the United States came to apply the sovereign immunity doctrine, according to Professor Borchard, 'is one of the mysteries of legal evolution.'" See 15 Rut. L. Rev. 98 (1960) *note;* discussed, 86 N. J. L. J. 1 (1963).

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the various reasons and tests assigned to determine the one classification or the other. Municipal Corp. 38 Am. Jr. 573, 574, pp. 266, 267; 63 C. J. S. sec. 747-750 pp. 34-38; Nissen v. Redelack 246 Minn. 83, 74 N. W. 2d 300, 55 A. L. R. 2d 1428 (1955) annotated p. 1434; under the topic "Municipal operation of bathing beach or swimming pool as governmental or proprietary function for purposes of tort liability"; Prosser, the Law of Torts (2d ed. 1955) sec. 109; 2 Harper and James, the Law of Torts (1956) sec. 29.6; 3 McQuillin, Municipal Corporations (3d ed. 1950) sec. 53.29; Dodridge, *Distinction Between Governmental and Proprietary Functions of Municipal Corporations*, 23 Mich. L. Rev. 325 (1925). In the present day, particular and new activities of municipal corporations give rise to further distinctions, *e.g.* "Parks, Playgrounds, Public Squares and Commons," 63 C. J. S. sec. 907; "Public Baths, Beaches and Swimming Pools," 63 C. J. S. 908, p. 322; further authorities collected, 60 A. L. R. 2d 1199 nn. 1-6.

Prior to the immunity statute of 1934, "governmental tort immunity" in New Jersey enunciated in *Board of Chosen Freeholders of Sussex County v. Strader*, 18 N. J. L. 108 (Sup. Ct. 1840) had been ratified by decisions of its courts of last resort to a point where the legal classification of the municipal activity involved was either governmental or proprietary with alternate liability or freedom in the field of tort law.[15]

Of course, the difficulty in determining the one classification or the other plagued the courts. See: Weintraub and Conford, *Tort Liability of Municipalities in New Jersey*, 3 Mercer, Beasley L. Rev. 142 (1934).

The precise effect of the statute upon municipal liability was considered by the lower courts in New Jersey, shortly after its enactment, in *Leeds v. Atlantic City*, 13 N. J. Misc. 868, 181 A. 892 (Cir. Ct. 1935), and in *Falcone v. Newark Board of Education*, 17 N. J. Misc. 75, 4 A. 2d 687 (C. P. 1939).[16]

In *Leeds*, the court pointed out that it could be presumed that the Legislature was mindful of the distinction between governmental and proprietary functions in the New Jersey decisional law when it enacted the statute in question, and that had a drastic change in the law been intended, such would have been manifest in the language of the statute. It found no such drastic change, and concluded that Atlantic City's ownership and operation of Convention Hall, where plaintiff was injured while a paying patron at a football game, was similar in nature to a

(15) Schwartz v. Stockton, 32 N. J. 141, 160 A. 2d 1, (1960), a learned opinion by Justice Hall, for the New Jersey Supreme Court, citing extensive authority; cf: Thompson v. Millville Bd. of Ed., 11 N. J. 207, 94 A. 2d 206 (1953); Cloyes v. Delaware Twp., 23 N. J. 324, 129 A. 2d 1 (1957).

(16) The 1933 enactment, effective in 1934, *R. S.* 40:9-2, *N. J. S. A.*, applied to school districts as well as municipalities and counties, and with the 1937 revision of the New Jersey Statutes, the statute was parceled into "Education" (*R. S.* 18:5-30, *N. J. S. A.*) and the statute here in question, "Municipalities and Counties": *R. S.* 40:9-2, *N. J. S. A.*

private enterprise, hence proprietary in nature rather than governmental and, consequently, not within the statute which would absolve it from liability for negligence.

In *Falcone*, the court was confronted with a case where a child was injured at school by a falling slate slab. It referred to the two exceptions to the general common law rule of non-liability of governmental bodies for negligence —active wrongdoing and proprietary function. The court declared that the statute in question was intended to modify the common law rule, but that the courts have carefully construed and applied the statute so as not to overrule unnecessarily the common law principles, pointing out that the statute concerns "public grounds, buildings or structures," and hence, public streets and public ways, and proprietary activities, as distinguished from governmental, are not within the protection of the statute.

Judge Goldman, in *Weeks v. City of Newark*, 62 N. J. Super. 166, 171-2, 162 A. 2d 314, 317 (App. Div. 1960), provided scholarly review and brilliant analysis of the law in New Jersey pertaining to the municipal immunity problem, stating:

> "Various courts have considered the statute subsequent to the *Leeds* and *Falcone* decisions. However, the precise effect of the statute upon the common law classification of municipal and county activities as governmental or proprietary has never been expressly declared by our court of last resort."

Judge Goldmann goes on to point out that cases presented to the Supreme Court of New Jersey are not such as to call forth any definitive declaration short of implying that common law distinction of governmental or proprietary functions persists as part of New Jersey law.

In *Weeks* the Court found that the municipality had engaged in a proprietary function, and hence, if negligent, was not protected by the immunity statute. The function

was the operation of a swimming pool, the Hayes Park Pool West, by the municipality, the City of Newark, where plaintiff was injured. It was held to be an activity not necessarily nor historically incident to government, but rather susceptible of, and usually exercised by, private enterprise.

With respect to the operation of a swimming pool by a municipality, the Court in *Weeks* observed that there are two general views reflected by the case law on the subject: (1) The majority or Massachusetts doctrine, on the question of immunity where a swimming pool is maintained and where nominal charge only may be made, proceeding generally on the ground that maintenance of a swimming pool is in the interest of the public health and welfare, hence, governmental; and (2) that of a strong minority, known as the *New York* line of decisions, holding proprietary-non-immunity, on the ground that the modern trend is against municipal non-liability, and although the public health might incidentally be benefited, it should be realized that a municipality that operates a swimming pool is acting as a legal individual voluntarily assuming a duty, not imposed upon it as a necessary and essential incident of government for the benefit of a locality rather than the general public.[17]

On appeal, *Weeks* was affirmed unanimously by the Supreme Court of New Jersey, *per curiam*. This convincingly demonstrates the Court's gauging of the development of the law on the problem before it, as well as the discernment of the judicial temper of the court of last resort in the State of New Jersey.

Those courts which classify these facilities as governmental do so usually on the ground that they have intimate

(17) *See generally*, 55 A. L. R. 2d 1434, anno. "Municipal operation of bathing beach or swimming pool as governmental or proprietary function, for purposes of tort liability; 51 A. L. R. 370, suppl. 57 A. L. R. 406, 8 A. L. R. 2d pp. 1310, 1315 and 1317; *also*, "Liability of municipal corporations for injuries due to conditions in parks," 29 A. L. R. 863, supplemental in 42 A. L. R. 263, 99 A. L. R. 686, 142 A. L. R. 1340, 60 A. L. R. 2d 1204, sec. 4(b).

relation with the public health or, more broadly, with the public good. Such is the rationale of the two cases stressed by the defendant, *Bisbing v. Asbury Park, supra,* and *Kuchler v. N. J. & N. Y. R. R. Co., supra.* The opinion in *Bisbing* is seemingly based, to some extent, on the criterion that "neither the grass plot (where the accident occurred), nor the way upon which it bordered, produced revenue to the City"; and further, that the land in question was a "park site" held for public purpose in governmental capacity, and therefore immune under *Strader.* The theory of corporate benefit as the sole proprietary test has since *Bisbing* been rejected in New Jersey.[18] In *Kuchler* it was determined that a municipality which leased from a railroad company a plot of ground maintained by it as a park immediately above the station was not liable for injury occurring as a result of ice on steps leading from the park to the station. The Court stated that "the maintenance of public parks is a recognized method of serving the public interest, and nothing in the instant case is presented to differentiate it as an exception from the application of this well-settled rule," relying for authority on *Bisbing.*

In *"Tort Liability of Municipalities in New Jersey", supra,* the "abundant crop" of decisions referred to by Chief Justice Hornblower in *Freeholders of Sussex v. Strader, supra,* ensued in passing years, as municipal activity expanded with changing times and became more com-

(18) See Weeks v. Newark, *supra;* Housing Authority v. Trust Co., 25 N. J. 330, 136 A. 2d 401 (1957). *Cf:* Hoffman v. Bristol, 113 Conn. 386, 155 A. 499 (1931), 75 A. L. R. 1191, where although recognizing the operation of a non-profit public bathing beach as a governmental function to which immunity attached, following the *Massachusetts view,* the municipality was held liable on the basis of nuisance for maintaining a diving board above shallow water. Note that while Massachusetts represents the majority view holding municipal beaches a governmental function, it also provides an interesting paradox: Cape Cod, a peninsula beached on three sides by the Atlantic Ocean, and comprised of approximately 68 small villages, consists principally of private beaches, and it would appear that the problem of municipal liability would seldom, if ever, arise.

plex. The article reviews the decisions of the New Jersey Courts up to May of 1934. Present day problems were there anticipated by the authors of the landmark treatise, and to some extent resolved a quarter of a century later. In *Cloyes v. Delaware Twp.*; the Supreme Court, then speaking through Justice Weintraub (now Chief Justice and one of the authors of the treatise) in 23 N. J. 324, 332, 129 A. 2d 1, 5, (1957), said:

> "We do not believe this is the case in which to consider whether to come to grips with the entire problem. We are satisfied that movement toward *Strader* is in the wrong direction. Hence, we confine the inquiry to the question of whether the operation here conducted is proprietary within the holding of more recent authorities, without regard to whether the result will jell with expressions which antedate them."

This then is the posture of the New Jersey law on this issue. There are no New Jersey cases which endow municipally owned public beaches or public parks with proprietary characteristics. The next logical query involves the legal compulsion of this Court to apply the substantive holding of *Kuchler* which relies on *Bisbing* which, in turn, relies on *Strader*.

Although there must be faithful adherence to state substantive law in non-federal matters it should be a wise and discerning loyalty. Blind adherence to certain state decisions, i.e., *Strader*, *Bisbing* and *Kuchler*, without evaluating those decisions in the light of other more recent and more relevant judicial developments would result in injustice and a perversion of the state law which a federal court sets out to apply.[19] The then understandable fear, assigned as a basis in *Strader*, for insulation against municipal liability —a pernicious dissipation of public funds—has become a

(19) See *Fahs v. Martin*, 224 F. 387 (5 Cir. 1955); See 1 A Moore Fed. Pract. (1961) 0.309.

myth under the conditions of a modern enlightened society. Like gaslight of another time it must give way to the brightened illumination of today, which chases the shadows and leaves exposed the inadequacy of such a Mid-Victorian concept.

The governmental-proprietary dichotomy is probably one of the most unsatisfactory known to the law. In 1955 a majority of five Justices of the United States Supreme Court spoke of ". . . the non-governmental-governmental quagmire that has long plagued the law of municipal corporations. A comparative study of the cases in the forty-eight states will disclose an irreconcilable conflict. More than that, the decisions in each of the states are disharmonious and disclose the inevitable chaos when courts try to apply a rule of law that is inherently unsound." *Indian Towing Co. v. U. S.*, 350 U. S. 61, 76 S. Ct. 122, 100 L. Ed. 48 (1955).

In *Bernhardt v. Polygraphic Company of America*, 350 U. S. 198 (1956), a relaxing of the strict rule was suggested. Faced in a diversity case with a question apparently settled by a 1910 decision of a state Supreme Court, it felt bound by that decision. The Court, however, noted:

> ". . . it was agreed on oral argument that there is no late authority from the Vermont court, that no fracture in the rules announced in those cases has appeared in subsequent rulings or dicta, and that no legislative movement is under way in Vermont to change the result of those cases.
>
> ". . . There appears to be no confusion in the Vermont decision, no developing line of authority that casts a shadow over the established ones, no dicta, doubts or ambiguities in the opinion of Vermont judges on the question, no legislative development that promises to undermine the judicial rule."

In a concurring opinion, Mr. Justice Frankfurter suggested that a federal court might decide that the Vermont court, if faced with the question at this time, might reach a conclusion contrary to the 1910 decision. He argued, quite forcefully, that the court should attempt to decide what the Vermont court would do with the question now.

The task, therefore, is to determine whether subsequent to *Bisbing* and *Kuchler*, there is judicial persuasion to convince this Court how the highest New Jersey State Court would decide this question.[20] The Supreme Court

(20) An examination of 50 years of judicial history of *Bisbing v. Asbury Park*, 80 N. J. L. 416, 78 A. 196, (E. & A. 1910) anno. 33 L. R. A. (N. S.) 523, discloses that it has been cited by the appellate courts of New Jersey only as companion authority with and since *Strader* (1840), *supra*, for the general principle that a municipality is not liable in negligence in the performance of its governmental duties, with certain exceptions such as proprietary functions and active wrongdoing; *e.g.* Karpinski v. Boro of South River, 85 N. J. L. 208, 88 A. 1073 (E. & A. 1913) where child injured by electric wire on street, the municipality supplying electric service to private consumers; Stephens v. Commissioners of Palisades Interstate Park, 93 N. J. L. 500, 108 A. 645 (E. & A. 1919), a case involving a broader concept—the defendant interstate (N. J. and N. Y.) Commission was directly created by statute and held to be within the rule in *Strader, supra*, of a public agency charged with a public duty and therefore absolved from negligence; Johnson v. Bd. of Ed. of N. Wildwood, 102 N. J. L. 606, 133 A. 301 (E. & A. 1926), injury in school building, followed *Strader, supra; Kuchler v. New Jersey & N. Y. R. Co., infra;* Liming v. Holman, 10 N. J. Misc. 582, 160 A. 32 (Sup. Ct. 1932), involved injury to a jail attendant by escapee, and relied on the general rule of public duty; Martin v. Asbury Park, (2 cases) *infra;* Com'r. Int. Rev. v. Sherman, 69 F. 2d 759 (1 Cir. 1934), involved question of exemption from tax of employee engaged in governmental function (now obsolete), but it states the *Massachusetts* view on parks, citing *Bisbing* with approval, but makes distinction in kind between parks created as part of a general statutory park system, and "pleasure resorts"; Doerr v. Newark, 128 N. J. L. 491, 27 A. 2d 198 (Sup. Ct. 1942), alleging injury from a fall in City Hall where plaintiff went to pay water bill, pointing out site of fall not clear, and she might have cause of action if in water department; Miller v. Layton, 132 N. J. L. 426, 41 A. 2d 24 (Sup. Ct. 1945), a bridge damage case much like *Strader*, upon which court relied; Hill v. Boro Collingswood, 9 N. J. 369, 88 A. 2d 506 (1952) pertained to a Park Commission, not unlike Palisades, *ante*, but there the park was part of a County Park System created by statute, R. S.

in New Jersey has spoken out repeatedly against the amplification of the doctrine of immunity from tort liability, despite a general legislative unwillingness to act in light of present day circumstances, and despite the reluctance of the majority of courts of other states to break with outmoded doctrines of the past. In *McCabe v. N. J. Turnpike Auth.*, 35 N. J. 26, 170 A. 2d 810, (1961), the Court found sufficient manifestation of legislative intent to subject the Turnpike Authority to suit, without resorting to the troublesome distinction of governmental or proprietary activity for negligently inflicted wrongs, pointing out that "Critical writers have made it clear that the doctrine of sovereign immunity has little relevancy to modern day concepts of justice".[21] As was stated by the Court in both *McCabe* and *Cloyes*, the doctrine of municipal immunity developed for a society totally unlike the present day one, and should not be further burdened with "hairline distinctions which are elusive and unsatisfactory and often most

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40:37-17, 18 as autonomous agency, and its general governmental function could not be thwarted by local zoning ordinance. And within the 35 years since *Kuchler v. New Jersey & N. Y. R. Co.*, 104 N. J. L. 333, 140 A. 329 (E. & A. 1928), the New Jersey courts have cited it in opinions only twice. See: Kelley v. Curtiss, 29 N. J. Super. 291, 297, 102 A. 2d 471, 473 (App. Div. 1954), reversed on other grounds, 16 N. J. 265; 108 A. 2d 431 (1954); Stringfield v. City of Hackensack, 68 N. J. Super. 38, 43, 171 A. 2d 361, 364 (App. Div. 1961) a municipal parking case, which merely alludes to it. Neither of these intermediate appellate cases relied upon *Kuchler* as controlling authority. Furthermore, in *Kuchler*, the site of injury was on steps *leading* to a park site leased from the railroad company.

A review of the New Jersey decisions of the past 35 years clearly demonstrates a more realistic attitude in the tort field towards the proprietary classification in refusing to extend an ancient, inflexible, and often harsh, and modernly unnecessary doctrine of immunity to new situations. "The New Jersey trend is in line with that being followed elsewhere." Schwartz v. Stockton, 32 N. J. 141, 147, 160 A. 2d 1, 4 (1960).

(21) See Taylor v. N. J. Highway Authority, 22 N. J. 454, 126 A. 2d 313 (1956). There Justice Jacobs observes that federal decisions persuasively point out that the doctrine of governmental immunity from suit in currently in disfavor.

artificial." And, as emphasized in *Cloyes,* any attempted explanation for judicial inconsistency can be found only in the history of the subject and the evolutionary development of that area of law as particular cases called for disposition in light of changing times, extended municipal activities, and progressive concepts of remedial justice in the field of tort liability. The underlying reason for the granting of immunity to municipal corporations was the practical concern of the courts to avoid the supposed inevitable flood of negligence actions, or, as stated in the *Strader* case, the "abundant crop." [22]

Comparisons, while not controlling of course, provide greater dimension to the concepts being considered. A factually analogous situation arose in *Ide v. St. Cloud,* 150 Fla. 806, 8 So. 2d 924, noted in 8 A. L. R. 2d 1317 (1942), where a city pursuant to charter power, maintained a public bathing beach to which the general public was invited. For some time, it had knowingly allowed a deep hole there to remain hidden and unguarded. Plaintiff's deceased husband and son were drowned. It was held that the complaint stated a cause of action. More than 40 years ago, Florida, a state equally famous, if not more so, for its public beaches as New Jersey, recognized municipal liability in tort to innocent victims of misfortune. In *Kaufmann v. Tallahasse,* 84 Fla. 634, 94 So. 697 (1922), it repudiated entirely the governmental-proprietary distinction with its judicially evolved "quagmire" of legal fictions and logistical niceties. The Florida court espoused the view that antiquated concepts were inapplicable to modern cities operating as municipal corporations under a commission or city manager form of government for the reason that in modern times the activities of such cities ". . . partake more of the nature of business than government." The court concluded further, that all such functions of municipal corporations would be considered proprietary, in the exercise of which, there would be liability for the negligence

(22) *Vide:* 3 Mercer Beasley L. Rev. 142, *op. cite.*

of its officers and agents. Thirty-five years after *Kaufmann*, in *Hargrove v. Town of Cocoa Beach*, 96 So. 2d 130, 60 A. L R. 2d 1193 (Fla. Sup. Ct. 1957), the court swept aside the basic immunity rule and established the principle of vicarious liability for both active and passive negligence under the doctrine of *respondeat superior*. Some of the language is particularly edifying. 60 A. L. R. 2d 1193, at pages 1196-1197:

> "The problem in Florida has become more confusing because of an effort to prune and pare the rule of immunity rather than to uproot it bodily and lay it aside as we should any other archaic and outmoded concept. . . . that the time has arrived to face this matter squarely in the interest of justice and place the responsibility for wrongs where it should be. In doing this we are thoroughly cognizant that some may contend that we are failing to remain blindly loyal to the doctrine of stare decisis. However, we must recognize that the law is not static. The great body of our laws is the product of progressive thinking which attunes traditional concepts to the needs and demands of changing times. The modern city is in substantial measure a large business institution. While it enjoys many of the basic powers of government, it nonetheless is an incorporated organization which exercises those powers primarily for the benefit of the people within the municipal limits who enjoy the services rendered pursuant to the powers. To continue to endow this type of organization with sovereign divinity appears to us to predicate the law of the Twentieth Century upon an Eighteenth Century anachronism. Judicial consistency loses its virtue when it is degraded by the vice of injustice."

In like manner, the Supreme Court of New Mexico abandoned old legal frontiers in the case of *Barker v. City of Santa Fe*, 47 N. M. 85, 136 P. 2d 480, 482 (Sup. Ct. 1943):

> "It is almost incredible that in this modern age of comparative sociological enlightenment, and in a republic, the medieval absolutism supposed to be implicit in the maxim, 'the King can do no wrong', should exempt the various branches of the government from liability for their torts, and that the entire burden of damage resulting from the wrongful acts of government should be imposed upon the single individual who suffers the injury, rather than distributed among the entire community constituting the government, where it could be borne without hardship upon any individual, and where it justly belongs."

Both *Kaufman* and *Barker* were adopted with approval by the Supreme Court of New Jersey in *McAndrew, supra*, observing that Illinois had done likewise for the same reasons in *Molitor v. Kaneland Community Unit District*, No. 302, 18 Ill. 2d 11, 163 N. E. 2d 89 (1959).

When viewed against the panorama of legal history, it seems inevitable that even with quickened enlightenment, responsive changes came more slowly and often with tedious caution. This seems especially true in regard to anciently venerated legal postulates which justify their continued existence on the pragmatic needs of remote times and outmoded conditions rooted in ritualistic adherence to the doctrine of *stare decisis*. *Stare decisis*, while a valuable and well established doctrine, should serve as a flexible channel marker for guidance and not as an immovable sand bar which may cause disaster; it should not be permitted to foreclose re-analysis and re-evaluation of legal postulates, which may well have lost their vitalizing principle. If outmoded and artificial distinctions are to persist in confining a court of law to a choice of specific alternatives, one of which provides remedy for an injured individual, and the other does not, then the choice of remedy seems clear as the demands of justice must be obliged in each particular case.

As was eloquently stated by Mr. Justice Holmes, commenting on "The Path of the Law", in *Collected Legal Papers*, Oliver Wendell Holmes, p. 187:

> "It is revolting to have no better reason for a rule of law than it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since and the rule simply persists from blind limitation of the past."

It seems axiomatic that when the reason for a rule or principle falls, so too the rule or principle. Justice Weintraub advanced this very rationale in *Cloyes*, 23 N. J. 324, 328; 129 A.2d 1, 3, stating:

> "At a time when municipal activities were few and the capacity of municipalities to respond in damages was uncertain, the doctrine of the *Strader* case undoubtedly seemed to be the common sense answer to the problem. But when municipalities and other governmental agencies expanded into new areas, either replacing private entrepreneurs or meeting new needs which theretofore had not required public activity, additional factors had to be weighed. The expansion of the area of operations enlarged the area of hurt. The number of private injuries which would go without remedy necessarily increased. The experience of private operators who performed subject to the ordinary principles of tort liability had demonstrated that such operations could absorb the impact of liability for negligence without curtailing or imperiling the service, and hence the fear of a crushing impact upon public funds which played a role in the *Strader* case was allayed . . . The advent of liability insurance increased confidence in the ability of local government to carry on without special immunity. And, lastly, concepts of fair play and justice changed. The notion that a remedy by indictment could satisfy the public interest became archaic. It

could not be adjusted to new thinking, the view that society is better served by absorbing the misfortunes negligently inflicted upon individuals rather than by leaving them to their own inadequate devices for the supposed benefit of the entire community."

Such lucid language of the Chief Justice seems particularly appropos to the matter now calling for resolution. The inquiry here is not one which seeks to impose undue hardship on a municipal corporation or confront it with absolute liability in the field of negligence, but rather to determine whether its conduct and activity are such as to call upon it, as with any other tortfeasor, to answer in liability on ordinary principles of negligence, where it voluntarily assumes to act in a proprietary capacity not necessarily incident and essential to its fundamental essence as a governmental body politic.

The foregoing decisions of the New Jersey courts, while not precisely dispositive of the issue here, provide the controlling rationale for determination and offer ample criteria in light of the current development of its law governing municipal liability in negligence.

With respect to the specific activities of defendant Atlantic City, in regard to the public bathing beach in question, the following operations appear from the evidence and stand uncontradicted or explained away by the defendant:

(a) The extensive efforts of defendant to induce, attract and invite persons generally, of which plaintiff was one, to come to its City and use its facilities, foremost of which was the beach and ocean bathing. It employed widespread national advertising for this purpose, at a cost of several hundred thousands of dollars annually.

(b) It imposes a system of "luxury taxes" for the raising of revenue for the municipal corporation, which taxes are passed on to all consumers and guests for the

use of its facilities, realizing approximately 1¾ million dollars annually, without which the City, according to the testimony of its Director of Revenue and Finance, would be "bankrupt". Some portion of such revenue was used to maintain and operate the beach in question; a sum over $200,000 annually.

(c) It fostered and provided by way of concessions on its boardwalk abutting its beach, snack bars, restaurants, rolling chairs, rest stations, rest pavilions, bath houses, and other public incidents of commerce; and on its beach, beach chairs, cabanas, umbrellas, pony rides, horseback riding, rest stations, from all of which it collected mercantile revenue.

(d) It provided a complete unit of Beach Patrol Police; so-called "protected beaches" by the stationing of lifeguard stands and a trained lifeguard patrol with ranking officers, having care of the beach, the foreshore, and the ocean, with the use of life-saving equipment, such as boats, rafts, surf boards, respirators, life preservers and the like.

(e) It provided a trained unit of beach personnel for the physical maintenance, care and cleaning of the beach surface, with appropriate supervisory personnel for inspections, such as the Captains of the Beach Patrol and the Commissioner of Public Safety.

(f) It provided medical stations, with physicians and trained personnel, for injuries sustained by bathers and other users of the beach area, which medical stations and personnel maintained a record of mishaps, injuries and medical assistance rendered, all of which were reported to appropriate municipal officers.

In *Weeks*, a public swimming pool was involved; in the instant case, a public bathing beach. In *Weeks*, the municipality exercised complete dominion and control of the public park swimming pool; likewise here; in both cases

the respective municipalities derived revenue; in both cases the municipalities provided facility to the public, and there was no discrimination against individual citizens or members of the public generally.

In the instant case the defendant municipality did not preempt any right of the sovereign State of New Jersey to operate the beach; it did not share the benefits or burdens with the State; it did not operate the public beach in question under and subject to the control or supervision of the State or as its agent or *alter ego;* it did not seek or employ any participation by the State as a necessary or desirable adjunct to its operation. On the contrary, the defendant municipality for the length and course of a great many years, assumed complete and exclusive dominion and control of the beach shore in question, and engaged in its operation and management to an extent manifestly commensurate with sole proprietorship.

Atlantic City fostered and sponsored a great influx of tourists to use its facilities; it was literally in the business of promoting tourists and their use of its attractions of entertainment and recreation; it is internationally characterized by itself, and others, as the "Playground of the World"; it has also become known as the "Convention City", as the city of "Miss America", of the beauty pageants, and recently the successful bidder for the Democratic National Convention at an estimated $650,000.00. Atlantic City's bare naive assertion that it was merely paternally and altruistically engaged in government in providing public park facilities for the well-being of its citizens, surrounding communities, the people of the State of New Jersey, of the nation and the world at large, in the face of its incurring of great expense, a full-time promotional endeavor, the reaping of substantial revenues and benefits, all without legitimately selfish proprietary interests and rewards, is at best unrealistic.

Thus, it is difficult to conclude, that, as a matter of law, defendant municipal corporation was performing time-

honored, customary and characteristic employments of a political governmental body charged with the collective good and welfare of its citizens, as with an isolated park-site where inhabitants seek health, rest and fresh air in an environment of trees, fountains, ponds, streams, knolls, footpaths, and the like, as anciently of the "Walden" of Henry Thoreau, and modernly generally associated with "parks"; or as with the quietude of a public library for research, study or contemplation. Rather, it engaged on a grand scale in the commerce of services and facilities unknown in earlier times when common law immunity in negligence cases arose. Indeed, it would be most difficult to conceive a private entrepreneur, and enterprise, which could so amply commercialize and exploit a natural resource, or resort, to such extent as to render certain municipal services as police and fire protection, streets and highways, welfare agencies, and the like, as merely a corollary to big business. That the defendant, Atlantic City, was engaged in a proprietary activity, as distinguished from a governmental function, in light of all the foregoing considerations, seems not only well founded in fact and logic, but is compelling for acceptance as a matter of law, with respect to its obligation to answer in negligence as a private proprietor similarly so engaged.

The *Bisbing* case, and *Kuchler* which relies upon it for authority, are not controlling in the instant case. In *Bisbing*, the court was steeped in the legal philosophy of *Strader*, which it cited as its major premise; it merely alluded to "private capacity" now well known in the decisions of New Jersey as "proprietary capacity". The court concluded that the use of the land there in question was governmental. *Bisbing* does not stand for the proposition, as contended by defendant, that public lands, or a public park, or some portion thereof, cannot under any circumstances be devoted to a proprietary use. *Kuchler* provides no greater persuasion for such contention. These cases have been significantly left behind in the development

of the law of New Jersey regarding municipal tort liability, as pointed out in *Cloyes*, and are clearly distinguishable both in fact and law. The crystalization of the substantive law of New Jersey in the past 50 years cannot be disregarded and resort made to earlier expressions alone, not precisely dispositive of a current issue of law. Such is the very folly interdicted by Justice (now Chief Justice) Weintraub in *Cloyes*. Rather it is this crystalization of the substantive law of New Jersey, as reflected in its judicial decisions of binding persuasion and compelling legal force, that has guided this Court to the applicable criteria and to its ultimate decision. As once said by Mr. Justice Holmes:

> "The law embodies the story of a nation's development through many centuries, and it cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics. In order to know what it is we must know what it has been and what it tends to become."

That a municipal corporation may act in many spheres and, in legal contemplation, be classified for particular purposes, is a matter of common experience.[23] A determination here, for the purposes of tort liability, that the maintenance and operation of the beach and bathing facilities incident thereto, by the defendant municipality, was in the nature of a proprietary activity, does not defeat, work a forfeiture or reversion, or occasion any violence to any restrictive covenant, grant, or deed of dedication limiting or circumscribing municipal purposes as "public park or place for public resort and recreation." Public purpose persists, although a particular use devoted to the

(23) *Vide: Cloyes v. Dela. Twp., op. cite; McCabe v. Highway Auth. op. cite; Gerr v. Turnpike, op. cite; e.g.*, the borrowing of funds, the issuance of bonds, operation of sewerage disposal plants, or water supply, highway authorities, turnpike commissions, condemnation proceedings, participation in federal loans and grants of funds for redevelopment or urban renewal, road improvements, soil erosion, etc.

public at large may be proprietary, as distinguished from governmental. In *Martin v. City of Asbury Park,* 111 N. J. L. 364, 168 A. 612 (E. & A. 1933), opinion by Chancellor Campbell, the City was held as a proprietor in its leasing of a bath house and bathing establishment, and answerable in negligence; and in the subsequent case of *Martin v. Asbury Park,* 114 N. J. L. 298, 176 A. 172 (E. & A. 1935), a supplementary proceeding where satisfaction of the judgment obtained in the foregoing case was sought, by execution against the leased bath house, and was denied. The court held that even though in the prior case there was a proprietary use, the land in question was devoted to a "public purpose" and therefore not subject to execution.[24]

Additionally, it is significant that enabling legislation in 1894, permitting cities bordering on the Atlantic Ocean to "open and lay out a public park or place for public resort or recreation on and along the beach or ocean front of such city" etc., and under which defendant acted, pertains to lands for dedication for public purposes, albeit, for multiple or disjunctive uses by such municipal corporations. Furthermore, mere characterization by a municipal corporation of a permissive public purpose does not determine and classify its particular use in negligence law.

As was so aptly stated in *Weeks,* 62 N. J. Super. 166, 183; 162 A. 2d 314, 323-324:

> "It is not unreasonable so to construe the statute here in question as to hold a municipality for negligence in the maintenance of . . . [land] devoted to the per-

(24) It should be noted, that the Court although citing *Bisbing* as authority for immunity, did not defeat the concept of divisible municipal capacity, governmental-proprietary, under the statute requiring public purpose of the lands in question. Therefore, neither it, nor *Bisbing,* stands for the proposition that "park lands" are *ipso esse* governmental function. To like effect: Baird v. Ed. of Recreation Commissioners, Village of South Orange, 108 N. J. Eq. 91, 154 A. 204 (Chanc. Ch. 1931), reversed on other grounds, 110 N. J. Eq. 603, 160 A. 537 (E. & A. 1932).

formance of a function voluntarily assumed under its general powers or by permissive legislation, or where it performs a service which could be provided as well (and often is) by a private corporation, or where the function is allocated to the municipality for its profit or special advantage, rather than for the purpose of carrying out the public functions of the state without special advantage to the city." [Brackets supplied.]

It is also urged that the Court erred in denying certain requests to charge made by defendant, Atlantic City, which had for their purpose the declaration of its immunity. Consistent with the Court's rulings on prior motions, these requests were denied.

The additional requests to charge were covered generally in the charge of the Court, and were for that reason denied;[25] or they had no foundation in the evidence, such as actuarial formulae or arithmetical computations,[26] and were carried generally in broad terms of "present value"; or did, in the Court's opinion, constitute prejudicial error as with the requested instruction regarding the absence of income tax assessment on any damage award made by verdict;[27] or lacked the citation of any reliable supporting authority, and the clarity of law and preciseness of language to which the Court was entitled.[28] Those requests of the codefendant, Warren, which defendant, Atlantic City, orally adopted by way of reference as its own, were for the reasons expressed to the codefendant, as well as the reasons set forth above, likewise denied.

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(25) Gerhart v. Disston & Sons, 290 F. 2d 778 (3 Cir. 1961); Keyser v. Hitz, 133 U. S. 138, 10 S. Ct. 290, 33 L. Ed. 531 (1889).

(26) See note 25, *ante*.

(27) Altemus v. Penna. R. Co., 32 Fed. R. D. 7, 210 F. Supp. 834 (D. C. Dela. 1963); McWeeney v. New York, N. H. & H. R. Co., 282 F. 2d 34 (2 Cir. 1960).

(28) 28 U. S. C. A. Rule 51; U. S. Dist. Ct. Dist. of New Jersey, Local Rule 18; Cherry v. Stedman, 259 F. 2d 774 (3 Cir. 1958); Alexander v. Kramer Bros. 273 F. 2d 373 (2 Cir. 1960).

The remaining thrust of the defendant's motion is that the jury's verdict for damages in the amount of $600,000.00 was "excessive," and a result of the "influence of passion, prejudice, mistake and sympathy." This Court is cognizant of its judicial responsibility where the amount of damages awarded by jury verdict is questioned; and it recognizes that, while the primary responsibility is that of the jury, it is not exclusively so, and the ultimate responsibility rests with the trial judge.[29] In this regard, certain cardinal features lighted the way for the jury in determining its award. On August 24, 1960, before the injury in this case, plaintiff was a young man, age 24 years, in good health, a bridegroom, gainfully employed as a high school mathematics teacher in Long Island, New York, and was furthering his education towards a Master's degree in the Science of Mathematics leading, in the natural course of events in this technological Age, to greater proficiency, increased earning potential and capacity, with a reasonably probable richer and fuller life. Indeed, he was virtually on the threshold of life's grand experiences. These are the uncontradicted facts in evidence. Against such is contrasted the plaintiff after injury. He sustained severe, complete and permanent traumatic injuries of the spine and spinal cord, with resultant quadriplegia. He was hospitalized immediately in the Atlantic City hospital, where he remained for about 4 months, and thereafter was transported to the Rusk Institute of Rehabilitation, in New York, where for some 14 months he underwent extensive and arduous rehabilitative therapy. Then, as now, he is completely paralyzed from the neck down the trunk of the body including the upper and lower extremities; he has succeeded in developing some shoulder and wrist movement only. He is permanently confined to his bed or a wheel chair, and requires the assistance of a male nursing attendant to admin-

(29) Guerini Stone Co. v. P. J. Carlin Constr. Co., 240 U. S. 264, 36 S. Ct. 300, 60 L. Ed. 636 (1915); Dellaripa v. New York, N. H. & H. R. Co., 257 F. 2d 733 (2 Cir. 1958).

ister to his personal and private needs. Periodic check-ups, medical treatments and antibiotics have been prescribed as essential, for the balance of his life expectancy, approximately 43 years, which, according to the uncontradicted testimony of plaintiff's medical expert, was established medically to be the same as for any other young man of his age, providing he has the continuing benefit of the prescribed medical care. His injuries terminated his gainful employment. He was earning as a high school teacher $4,500.00 annually in the New York School System, and has a wage-loss to date of approximately $10,000.00. His medical bills to date approximate $23,964.71, and estimated further medical expenses are at least $1,500.00 annually. Further education, if not impossible, is at best highly improbable. These then, are the uncontradicted facts in evidence. And it may well be noted, that in the presentations and arguments of all counsel in this case, they displayed commendable restraint, awareness of legal proprieties and utmost good taste. There was not the slightest nuance of passion or sympathy engendered by counsel.

There is nothing which would warrant, or should prompt, this Court to pretend to a wiser assessment of damages for the injuries to this particular individual, and substitute its judgment for that of the twelve jurors sworn, no less, to exercise their best judgment in the same cause. While precise formulae in the area of personal injury negligence law remain elusive and undevised, our jurisprudence demands that provision be made for fair, just and reasonable compensation. Clearly this is what the jury has endeavored to do; and it is this, nothing more or less, that this Court believes it has done. Furthermore, in the exercise of this Court's judicial discretion, it is its conviction that there was substantial basis in the evidence for the amount of damages awarded by the jury and that, under all the instant circumstances, the verdict represented fair, just and reasonable compensation.

In summary, it was the finding of this Court, at the conclusion of the testimony, that the defendant, Atlantic City, was engaged in a proprietary activity within the meaning of the substantive law of New Jersey, and, as such, chargeable in negligence if found guilty of wrongdoing, and the case was so submitted to the jury with appropriate instructions on negligence and nuisance as a specific refinement thereof. However, if governmental, then this case may very well be the one that the New Jersey Supreme Court was waiting for. This could very well be, as stated by Chief Justice Weintraub in *Cloyes*, 23 N. J. 324, 332, 129 A. 2d 1, 5 (1957) "the case in which to consider whether to come to grips with the entire problem." In any event, assuming but not conceding, that the operation of the public beach be construed governmental in capacity and function, it is the view of this Court that the defense of immunity is still unavailable to the defendant because of its active wrongdoing.[30] There were here committed acts of commission and acts of omission—tantamount to commission—so overwhelmingly negligent that had a motion been made by the plaintiff for the direction of a verdict, this Court would have been hard-pressed to retreat from an obligation to grant it, and to submit to the jury for its determination, the sole issue of damages. In view thereof, it is now, after verdict, the conclusion of this Court, that there was presented legally sufficient and factually ample evidence of Atlantic City's negligence. Here was a situation where an extremely perilous condition, without any warning whatsoever, was permitted to continue for an intolerable period of time, despite the reoccurrences of accidents almost daily, despite the admitted knowledge of and recognition of danger by numerous municipal employees and officials one of whom was the Director of Public Safety, the other charged with the care and maintenance of the beach, and despite countless recom-

(30) See Zanca v. Conti, 73 N. J. Super. 23, 179 A. 2d 129 (App. Div. 1962).

mendations—if not pleas—for the removal of these treacherous pipes. To sit idly by and countenance such known danger to the unsuspecting public, to fail to take reasonable measures to avoid disaster instead of temporizing with the situation,[31] is abundant proof of grossly negligent conduct. The verdict of the jury against the defendant, Atlantic City, was proper. Insofar as the propriety of the jury's verdict in favor of the defendant, Warren, the provision of a private hotel beach to its guests, knowledge of the hazardous pipes, and direction of the plaintiff by the hotel to a known place of peril, presented purely factual issues that were resolved by the jury in Warren's favor. There was substantial basis for such finding.[32]

For all these reasons, the motions of the defendant, Atlantic City, are denied, and the verdict of the jury as recorded shall remain undisturbed.

The appropriate order may be submitted.

MITCHELL H. COHEN,
Judge, U. S. District Court.

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(31) See Zanca v. Conti, *ante*.

(32) Aetna Cas. & Surety Co. v. Yeatts, *op. cite;* Montgomery Ward & Co. v. Duncan, 311 U. S. 243, 61 S. Ct. 189, 85 L. Ed. 147 (1940).

JUDGMENT OF THE U. S. DISTRICT COURT.

The above entitled action having been tried before the Honorable Mitchell H. Cohen, U. S. D. J., and a Jury, on May 27th, 28th, 29th, 31st; June 3rd, 4th and 5th, 1963, and the Jury having returned a verdict in favor of the Plaintiff, Andrew Caporossi against the Defendant, Atlantic City, a municipal corporation of the State of New Jersey, in the sum of $600,000.00; and a verdict of No Cause for Action in favor of the Defendant, Lester Warren, Inc., a corporation of the State of New Jersey, against the Plaintiff, Andrew Caporossi; and a verdict of No Cause for Action in favor of the Defendant Lester Warren, Inc., a corporation of the State of New Jersey, on the Cross-claim of the Defendant, Atlantic City,

It is, on this 6th day of June, 1963,

ORDERED that judgment in the sum of $600,000.00 be entered in favor of the Plaintiff, Andrew Caporossi against the Defendant, Atlantic City, a municipal corporation of the State of New Jersey, with costs, and it is further

ORDERED that judgment of No Cause for Action be entered in favor of the Defendant, Lester Warren, Inc., a corporation of the State of New Jersey, against the Plaintiff, Andrew Caporossi, without costs; and No Cause for Action in favor of the Defendant, Lester Warren, Inc., a corporation of the State of New Jersey, on the Cross-claim of the Defendant, Atlantic City, without costs.

MITCHELL H. COHEN,
U. S. D. J.

APPENDIX C.

State Legislative Efforts to Improve the Seacoast Resort Economy.

In the preamble to the Act of 1922, L. 1922, c. 35 § 1, p. 65, R. S. 40:179-109, N. J. S. A., which permitted the resort cities to erect and operate "convention halls" to improve their revenues, the recital recognized that certain cities had undertaken to lay out beach parks but had been unable to do so because of financial difficulties, *inter alia*. See Historical Note to R. S. 40:179-109, N. J. S. A.

In 1931, the Legislature enacted statutes providing for a Municipal Finance Commission, a "quasi-receivership" of municipalities which were in default in the payment of principal or interest on municipal notes or bonds. L. 1931, c. 340, § 102, p. 831, as amended, R. S. 52:27-2, et seq., N. J. S. A. In 1935, the resort City of Asbury Park came under control of the Municipal Finance Commission. *City of Asbury Park v. Smock*, 121 N. J. L. 487, 3 A. 2d 607 (Sup. Ct. 1939).

In 1936, the Legislature provided

> "In every municipality under control of the municipal finance commission, and which shall own the beach and upland contiguous thereto, a beach commission shall be appointed. This commission shall consist of four suitable persons, residents of such municipality. Said persons shall be known as beach commissioners and shall be appointed by the governor, by and with the advice and consent of the senate, * * *." L. 1936, c. 160 § 1, p. 372, R. S. 40:55 A-1, et seq. N. J. S. A.

The Beach Commission so established had absolute power over the beach, all revenues related to it were kept in a separate account solely to benefit the beach, the Beach Commission operated independently of the municipal government and answered solely to the governor and state legislature. See R. S. 40:55 A-5:

> "The beach commission * * * shall * * * be substituted for and vested with all the powers and duties now vested in or exercised by the governing body of such municipality, relating to and in respect of the management and control of the beach, and the construction, maintenance, and use of the beach, and all properties and structures, piers, bulkheads and jetties owned by the municipality contiguous to such beach, and shall lay out, embellish, improve, manage, and control the boardwalks, convention halls, bath houses, places of amusement, stores, buildings, and properties, and the portions of the beach owned and heretofore controlled by such municipality * * *."

And see, *Asbury Park v. Smack*, 121 N. J. L. 487, 3 A. 2d 607 (Sup. Ct. 1939); *Kleinfus v. Sirgany*, 17 N. J. Misc. 175, 178, 6 A. 2d 724, 726 (Cir. Ct. 1939).

Regarding the separate accounting and its purpose, see R. S. 40:55 A-8; R. S. 40:55 A-9; and R. S. 40:55 A-10, N. J. S. A.; the latter section provides:

> "It is the intention of this chapter to make available to such beach commission, for the conduct of the beach and its enlargement, extension, improvement, and for the addition of new and further facilities, all moneys which shall be received for the operations of such beach and the properties and structures thereon, whether currently or theretofore earned, and all moneys raised by taxation or otherwise for beach purposes, and to place the same under the jurisdiction and control of said beach commissioners, to the end that the same shall be self-sustaining and self-liquidating and thereby relieve the taxpayers."

In 1945, the Legislature (in an Act later held unconstitutional as a special law) recognized the acute financial problems and instability of the resort economy:

"An emergency is hereby declared to exist in municipalities bordering upon the Atlantic Ocean which are seaside or summer resorts and which because of their size have a great fluctuation in the number of visitors, because of the recent hurricane, the continued erosion of beaches and the danger of hurricane in the near future; all of which make it impossible for such municipalities to function normally as seaside or summer resorts during the next three fiscal years unless some additional revenue can be raised for use in providing and continuing the facilities which attract visitors to such municipalities as seaside or summer resorts." L. 1945, c. 156, p. 544, § 2, R. S. 40:48-8.2, N. J. S. A.

In 1947, the Legislature renewed its efforts to stabilize the resort economy by providing for a new sales tax applicable to such cities, L. 1947, c. 71, p. 431, § 1, et seq., R. S. 40:48-8.15, N. J. S. A. Its purpose was so stated:

"Whereas, the Legislature, in furtherance of public policy, has for a period of years greatly enlarged municipal activities, principally in matters of public health and safety, with no consequent grant of revenue power to meet these modern and constantly expanding conditions; and

Whereas, the sources of revenue in the various municipalities, particularly in Cities of this State bordering upon the Atlantic Ocean and being seaside or summer resorts, are inadequate and insufficient to meet existing municipal obligations; and

Whereas, many of these impositions are mandatory in character, and it is necessary and essential that such cities be given power to increase existing revenues; therefore". Historical Note, R. S. 40:48-8.15, N. J. S. A.

In 1948, in rejecting a constitutional challenge to the Statute, the New Jersey Supreme Court clearly stated the situation,

> "The proofs show that the presence of summer visitors imposes an unusual burden upon municipal government since it must increase its facilities for police and fire protection. The beach front must at all hazards be saved and it must be cleaned and policed. Suitable provision must be made for bathing and the safety of bathers.
>
> The statistics adduced, and made a part of the record, in this case indicate that the municipal expenses in cities binding upon the Atlantic Ocean are very different from comparable inland cities where the extraordinary expenses mentioned do not exist and where a normal business is carried on for a much longer period of the year." 137 N. J. L. at 350, 60 A. 2d at 246-47. *Karins v. Board of Com'rs of Atlantic City*, 137 N. J. L. 349, 350, 62 A. 2d 246, 247 (Sup. Ct. 1948).

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. [redacted] 167

ATLANTIC CITY, a municipal corporation of the State of New Jersey,

Petitioner,

v.

ANDREW CAPOROSSI,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, FOR THE THIRD CIRCUIT.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963.

No. 1202.

ATLANTIC CITY, a municipal corporation of the State of New Jersey,

Petitioner,

v.

ANDREW CAPOROSSI,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

Citations to Opinions Below.

The opinion of the District Court (R. 40a-80a) is reported at 220 F. Supp. 508 (1963). The opinion of the Court of Appeals is reported at 328 F. 2d 620 (1964).

Questions Presented.

1. Whether a Writ of Certiorari should issue where the courts below decided a provincial tort issue in accord with the most recent holdings of the highest court of the State of New Jersey.

2. Whether there is conflict among the circuits as to the application of the doctrine of *Erie R. Co.* v. *Tompkins* which led to error in the courts below.

3. Whether the United States Supreme Court should review interpretations of local law made by the District Court and unanimously affirmed by the Court of Appeals where the District Court Judge was a member of the New Jersey Bench and Bar prior to his appointment to the Federal Bench.

Counter-statement of the Case.

The factual basis for the respondent's action against the petitioner, was as follows: On August 24, 1960, the respondent, while lawfully (20b, 22-28) in the ocean adjoining the beach under the exclusive control of the petitioner (R. 191, 19-23), struck his head on submerged pipes sustaining serious personal injuries (R. 559, 1-564, 18).[1] These pipes were installed pursuant to a permit issued in March of 1944 by Atlantic City to a former owner of the New Davis Hotel, Rose Fleischer (R. 361, 4-362, 5; 31b). They were exposed to view at low tide for a long period of time prior to August 24, 1960. However, shortly after the tide would rise, they became covered so that they were not visible to persons using the beach (17b, 36-18b, 3; 34b-39b; R. 374, 19-375, 23). The pipe lines ran from the ocean at St. Charles Place to the property of the New Davis Hotel (destroyed by fire in 1952) which was located on the lot purchased by the defendants Gerber in 1954. The permit for the lines was

[1] Citations to the Respondent's Appendix, Petitioner's Brief, Petitioner's Appendix and the Transcript of Record are to the page and line thereof. The lines are counted from the first line of text and not from the headings on the page except where the lines are numbered in the margin.

adopted by resolution and filed with the City Clerk in 1944 (33b). The fact that these pipe lines constituted a hazard to bathers was a matter of common knowledge (R. 167, 7-12; 2b; 28-29). The Commissioner in charge of beach maintenance (7b, 7-20) and the Commissioner in charge of public safety (R. 135, 18-23) knew that salt water pipes were employed by various hotels and of their exposure as previously described (R. 290, 2-13). Commissioner Casey, in charge of beach maintenance, knew not only that salt water lines were not used since 1934, but that they constituted a hazard to bathers and, in particular, knew of the presence of exposed pipes between Garden Pier and the Steel Pier (R. 200, 3-201, 9; R. 206, 10-20). This area includes St. Charles Place, the site of the plaintiff's accident. Captain Stetser, the chief life guard at St. Charles Place, also knew of the presence of exposed pipes in the vicinity for a period of 6 years prior to August 24, 1960 (25b, 3-10). He reported the presence of these pipes to his superior, Richard Hughes, chief of the beach patrol of Atlantic City, with the admonition that the pipes constituted a hazard to bathers and that the city should get rid of them (25b, 38 to 26b, 20). No action was ever taken (R. 379, 3-10; 26b, 22-26; R. 415, 14-416, 10). In 1959, Bert Eslow, a lifeguard who later became a medical assistant at the beach, knew of and aided persons who sustained injuries on exposed pipes at St. Charles Place (11b, 8-19). He, too, regarded them as a hazard and reported them to Captain Stetser (R. 348, 3-18; 24b, 13 to 25b, 7). Despite the dangerous condition created by these pipes, signs were not maintained concerning their presence either at the entrance to the beach, on the beach or in the water where the pipes were located (19b, 37-20b, 5; 11b, 21-28; R. 345, 6-9). Despite Captain Stetser's recommendation about removing the hazard and subsequent

inspection of the hazard by members of the city engineering department, nothing was done to correct the situation (13b, 6, 28; 25b, 26b). As a result, it was not uncommon for lawful users of the beach at St. Charles Place to enter the ocean and, while bathing, injure themselves on pipes which were beneath the surface of the water but above the surface of the ocean bed (11b, 6-14; R. 348, 3-18; 14b, 10-26; 18b, 19-36).

Although no charge was made to persons using the beach, luxury taxes were imposed by the petitioner on the hotels and other merchants which were paid by guests and consumers (91a, 18-31). In furtherance of its endeavors to entice and attract people to the resort, the city advertised in newspapers extensively so as to reach about fifty million persons (100a, 3-25; 108a, 8-109a, 19) and in 1959 and 1960 spent over $185,000 annually on this medium (101a, 23-39; 103a, 35-104a, 6). The amount collected in luxury taxes for 1959 was $1,797,457.40 and in 1960 was $1,781,531.07 (113a, 30-114a, 40). Two of the city Commissioners, Casey and Kerstetter, testified that the luxury taxes are passed on to visitors to the city or, as Commissioner Casey testified: "They pay it and we spent it" (91a-32). As a direct result of the use of its resort facilities and, in particular, the beach in question, it was admitted by the Commissioners that the city obtains an economic benefit (87a, 25-27; 91a, 37-92a, 10; 355a, 41-48).

In addition to the luxury taxes, Atlantic City also exacted revenue from merchants in the form of mercantile license fees as does most other municipal corporations in New Jersey (93a, 31-95a, 5). However, it is interesting to note the relationship between fees charged for common business activities and those charged for operating enterprises commonly associated with the city's status as "Vaca-

tion Capital of the Nation" and "Convention Capital of the World" (229a). For example, the annual license fee for (1) establishments conducting group games of skill having seating facilities is $3,000.00; (2) auction stores is $1,000.00; (3) a circus is $1,000.00; (4) slot machine parlors is $500.00; (5) each beach chair is $1.00; (6) Astrologers is $750.00; (7) each exhibit charging an admission fee or accepting donations is $250.00; (8) any Ocean Pier charging admission is $1,000.00; (9) Phrenologists is $300.00; (10) a Rolling Chair station is $500.00; (11) each "guess your weight" scale is $150.00; (12) each "kiddie ride" is $100.00; (13) each skee ball alley is $10.00; (14) a hot dog stand is $50.00.

In contrast to these license fees, the business establishments (found in almost every municipality) are taxed at relatively nominal rates, e.g., the annual license fee for (1) a barber shop is $15.00; (2) a bakery shop is $15.00; (3) a book dealer is $15.00; (4) a furniture store is $35.00; (5) a jewelry store is $15.00; (6) the sale of meat retail is $15.00; (7) a radio store is $25.00; (8) the sale of shoes is $15.00; (9) the sale of sporting goods is $15.00; (10) tailoring merchants is $15.00; (11) sale of wallpaper is $15.00; (12) undertakers' establishment is $25.00. (The ordinance is set forth in toto at 294a.) In the words of the District Engineer of the Corps of Engineers of the United States Army which surveyed and justified the need for protecting Atlantic City from extinction due to oceanic erosion, by stating "* * * the resort business is the only substantial reason for the existence of the city" (348a, 17-18).

The beach under consideration was obtained by Atlantic City from individual grantors in 1900 (285a-293a). The City covenanted that the beach was to be used as a park or place for public resort and recreation (290a, 29-32), and that the grantors' land would not be condemned (288a, 26-

36). The deed recited that the transfer was for the benefit and advantage of the grantors (288a, 31-33). Among other benefits, they were permitted to lay down and maintain pipes under the beach to convey salt water to their remaining untransferred parcels of land (289a, 36-290a, 5). The land under the high water line was purchased by it from the State of New Jersey for the sum of $21,062.50 in 1907 (302a-308a). The deed recited that the lands conveyed were to be used solely for a park or place of public recreation and resort (305a, 15-21). The deeds here involved do not suggest in any manner or form that the land conveyed could not be used to exploit this natural resource for the direct or indirect pecuniary benefit of Atlantic City. Neither of the deeds require that the beach facilities be provided to the public free of charge or that the lands not be utilized commercially; nor is any restriction placed upon the ability of Atlantic City to lease, rent, or otherwise alienate the lands so long as the use remains within the provisions of the deed.

The respondent, Andrew Caporossi, instituted suit in the United States District Court against the petitioner, City of Atlantic City, and others on July 19, 1961. The action was based on two theories: First, Atlantic City was negligent in maintaining, operating and controlling the beach on which the respondent was injured (10a, 34) and secondly, Atlantic City maintained a nuisance on the beach which caused injuries to the respondent (11a, 23). Atlantic City filed an Answer setting forth nine separate defenses (16a-18a) of which only the Ninth Defense (dealing with statutory immunity) was seriously urged during the trial below. The trial court decided as a matter of law at the end of the entire case, that the operation of the beach by the petitioner Atlantic City was a proprietary function and therefore, that R. S. 40:9-2 (N. J. S. A.) (R. 1251,

2-1255, 12) did not apply. The case was submitted to the jury, as far as the petitioner is concerned, on three issues: negligence (175a, 21-177a, 19), nuisance (177a, 20-178a, 6) and damages (181a, 27-184a, 12). No objection was taken by the petitioner to the Court's instructions on the issue of nuisance. At the end of its deliberations, the jury returned a verdict of $600,000.00 in favor of the respondent against Atlantic City (191a). The petitioner's motion for judgment N. O. V. or for a new trial (35a-39a) were denied (81a) by the trial court in a written opinion (40a-80a). The opinion of the District Court was unanimously affirmed by the Court of Appeals on the opinion below (petitioner's Appendix A).

Summary of Argument.

I. The petitioner has failed to show that the courts below clearly erred and unreasonably decided a provincial issue of tort law in finding that applicable state law required a determination that in operating and maintaining a bathing beach, the municipality was engaged in a proprietary activity.

A. The issue with which the courts below were concerned was of local concern only in that it characterized a particular bathing beach as a proprietary function rather than deciding grave public issues of general importance.

B. The courts below correctly ascertained the state law and applied it to the case at bar without error.

II. There is no conflict among the circuits as to the application of the rule of *Erie R. Co. v. Tompkins* which led to confusion and error by the courts below.

III. The court should not disturb the findings of local New Jersey law made by the District Court, the Judge of which was a member of the Bar and Bench of New Jersey prior to his appointment to the Federal Bench and where such findings were affirmed *per curiam* by the Court of Appeals.

Reasons for Denying the Writ.

POINT I.

The Court should deny certiorari because the decisions below did not decide an important state question in a way in conflict with applicable state law.

A. The Courts below did not decide a state question of gravity and general public importance.

United States Supreme Court Rule 19, 1(b), 28 U. S. C. provides that this Court may exercise its discretion to grant a Writ of Certiorari only if ". . . there are special and important reasons therefor" such as where "a court of appeals . . . has decided an important state or territorial question in a way in conflict with applicable state or territorial law . . ." Thus the petitioner's burden of persuasion is two-fold. First, he must demonstrate the importance of the state question and second, he must demonstrate the conflict between the decision and the applicable state law. In the instant case, neither burden can be sustained.

The issue with which the courts below were concerned was simple. The New Jersey court of last resort has indicated that it is only where an activity of a municipal corporation is characterized as "governmental" rather than "proprietary", may the municipality escape liability for its negligence. *Weeks* v. *City of Newark*, 62 N. J. Super.

166, 162 A. 2d 314 (App. Div. 1960), affirmed o.b. 34 N. J. 250, 168 A. 2d 11 (1961) and the cases cited therein. The only issue before the courts below was whether Atlantic City's activity was proprietary, thereby rendering it liable in negligence to the plaintiff or governmental, thereby rendering it immune. It is respectfully submitted that this provincial issue is of local concern only and does not merit review by the nation's highest court. We are not here concerned with a legal question of national importance which effects the lives, liberties and rights of United States citizens.

The influx of some thirteen million visitors to Atlantic City annually is not disputed, nor is the fact that the gross receipts from these visitors in 1947 was estimated at $500,000,000.00 in addition to the $1,870,000.00 the City annually collects in luxury taxes from the hotels and patrons. The amounts of money connected with Atlantic City's resort business are staggering and to assert that the decisions below will affect the economic stability of Atlantic City as well as the entire Atlantic seacoast resort area is somewhat of an exaggeration of the impact of the verdict. Likewise, any increases in the City's liability insurance policy premiums will not create a situation effecting the economic stability of Atlantic City. On the matter of insurance, *Weeks* noted that "The availability of liability insurance has increased confidence in the ability of local government to carry on without special immunity" 62 N. J. Super. at 182. Furthermore, nothing more than the petitioner's representations of insurance premium increases has been presented to this Court.

One of the resort areas of New Jersey of the greatest historical, military, navigational and recreational significance is Sandy Hook. Many state residents and visitors

are attracted to this area annually. So integrally woven with state interest is Sandy Hook that in 1950 the New Jersey Legislature created the Sandy Hook Reservation Authority as an "essential government function of the State" L. 1950, c. 290, p. 972, sec. 2, R. S. 13:15-2 (N. J. S. A.). Among the powers of the Authority is the power to "sue and be sued in its own name" L. 1950, c. 290, p. 974, sec. 6, R. S. 13:15-6 (N. J. S. A.). The same powers are bestowed upon the New Jersey Turnpike Authority by L. 1948, c. 454, p. 1860, sec. 5, as amended L. 1950, c. 1, p. 14, sec. 5, R. S. 27:23-5(d), (N. J. S. A.) and the New Jersey Highway Authority which operates the Garden State Parkway by L. 1952, c. 16, p. 69, sec. 5, as amended L. 1953, c. 164, p. 1419, sec. 5, R. S. 27:12B-5(d), (N. J. S. A.). The interest of the citizens of New Jersey and the nation in these projects is far greater than their interest in the beach of Atlantic City. Yet the New Jersey Legislature has recognized that the impact of negligently caused injuries is far better sustained by the citizenry who benefit from the activity than by the individual damaged through no fault of his own. This principle has also guided the New Jersey Courts toward an increasingly more liberal approach to the problem of municipal immunity as discussed, *infra*.

The federal and state government interests in the Atlantic City beach area are admitted by the respondent. That interest is one which has grown with numerous interests in other natural resources on which both state and federal authorities have spent millions of dollars. Today the tentacles of federal and state government reach deep into every facet of our lives. The fact that a political unit other than the local governing body contributes funds toward its preservation is not evidence that an activity is so fraught with national public interest that review of a negligence

action arising therefrom is warranted by this Court. If that be true, every activity contributed to by the federal or state government would reach the height of review by this Court. Insofar as New Jersey is concerned, such action would involve a review of any occurrence on New Jersey's thousands of miles of waterways due to the provisions of L. 1954, c. 106, p. 578, sec. 1, R. S. 12:6A-1 (N. J. S. A.) empowering the State Department of Conservation and Economic Development to construct and repair ocean appurtenances on every beach front along all coastal, estuary and inland waterways of New Jersey.. Certainly the procedure for Writ of Certiorari was not intended to devolve to this point. Indeed this Court has stated that the Writ of Certiorari is a discretionary procedure to be exercised sparingly only in cases of particular gravity and general importance. *Ex parte Lau Ow Bow,* 141 U. S. 583 (1891). The importance of review to the petitioner is of no consequence to this Court in determining whether the Writ should issue. *Fields v. United States,* 205 U. S. 292 (1907).

In its attempt to show the magnitude of this provincial issue, the petitioner has advanced only two arguments. First, that federal and state aid has been granted to New Jersey coastal cities to prevent oceanic erosion. Second, Atlantic City's liability insurance premiums for the beach may increase. The petitioner has argued propositions which, at best, rest only on possibility. Insurance premiums *may* increase. Economic prosperity *may* be effected. The fact of the matter is that the gravity of the question is evidenced only by the fact that a $600,000.00 verdict is involved. This "gravity" is in marked contrast to that in *Fields v. United States, supra* wherein this Court determined that the petitioner's loss of his liberty and reputation occasioned by a five year sentence for embezzlement was not sufficiently grave to warrant review. Thus, the

issue of gravity and general importance mentioned in Rule 19, 1(b) does not exist in this case and therefore the Writ should be denied.

B. The Courts below did not render a decision in conflict with applicable State Law.

The petitioner has also failed to sustain the second portion of his burden, i.e., to show conflict between the decisions below and the applicable state law. The standard of persuasion to which the petitioner's presentation to this Court must conform was stated in *Palmer* v. *Hoffman*, 318 U. S. 109, rehearing denied 318 U. S. 800 (1943). This Court held that where the lower federal courts are applying local law, their rulings will not be set aside except upon a plain showing of error. The petitioner's burden was also stated by this Court in *Helvering* v. *Stuart*, 317 U. S. 154 (1942) as producing in this Court a definite conviction of error as to the decisions of the lower federal courts. With these standards of persuasion in mind, we proceed to examine whether the Court of Appeals, which affirmed the District Court unanimously, and the District Court decided this case in conflict with the applicable state law.

In every diversity case the first question posed for the federal court is "What is the state law?". In the opinion of the District Court Judge, who was a distinguished member of the Bench and Bar of New Jersey prior to his appointment to the Federal Bench, it is obvious that he scrutinized the entire history of municipal immunity in New Jersey, pursuant to the duty imposed by *West* v. *American T. & T. Co.*, 311 U. S. 223, 237 (1940). The problem was traced from its inception in *Board of Chosen Freeholders* v. *Strader*, 118 N. J. L. 108 (Sup. Ct. 1840) through *Weeks* v. *City of Newark*, *supra*. The rationale of the old cases as well as the more recent and enlightened

approach was examined. He was led to the conclusion that the New Jersey law dictated that Atlantic City was engaged in a proprietary function in operating the beach under discussion. The absence of a state case on "all fours" necessitated a reliance upon the reasoning of the applicable New Jersey cases rather than the facts of any of them.

The trial court relied in part upon *Weeks* v. *City of Newark, supra.* As with the instant case, *Weeks* involved a novel fact pattern to which the court was called upon to apply the governmental versus proprietary distinction. The applicability of the principles being novel, the court undertook an exhaustive review of the law of New Jersey, its sister states and the views of the text writers. Based upon the sound New Jersey cases preceding *Weeks* and those of foreign jurisdictions, the Appellate Division of New Jersey concluded that the municipal operation of a public bathing pool was a proprietary function. The New Jersey court cited with approval several cases in other jurisdictions wherein injuries occurred on municipally operated public bathing beaches. In each case, the municipality was held to have engaged in a proprietary function and therefore were liable in tort. See *Augustine* v. *Brant*, 249 N. Y. 198, 163 N. E. 732 (Ct. App. 1928), re-argument denied 250 N. Y. 537, 166 N. E. 315 (Ct. App. 1928) and *Norberg* v. *Hagna*, 46 S. D. 568, 195 N. W. 438 (Sup. Ct. 1923) cited at 62 N. J. Super. 176. The state court also relied on *McQuillin, Municipal Corporations* (3d ed. 1950), Vol. 18, sec. 53.113, p. 477:

> "... In view of the tendency of late decisions and development of the law on this subject, the rule will ultimately prevail that in maintaining parks, playgrounds, bathing pools and beaches, and like recreations, the city is performing a local function for its people and it should be held liable on the same basis as a private person or corporation."

The decision was affirmed by the New Jersey Supreme Court on the basis of the Appellate Division's opinion.

Contrary to the petitioner's contention that "the *Weeks* decision did not even mention the *Bisbing* case" (Petitioner's Brief p. 21), (*Bisbing* v. *Asbury Park*, 80 N. J. L. 416, 78 Atl. 196 (E. & A. 1910), *Weeks* alluded to the line of authority relied upon by the petitioner (62 N. J. Super., at 181, 168 A. 2d at 323):

> "We deem our conclusion that Newark's ownership and operation of the Hayes Park West Pool is a proprietary activity to be in accord with the trend toward restricting municipal immunity which runs through modern legal literature and through our recent appellate decisions, particularly the Cloyes case, above. Our Supreme Court there recognized that in recent time municipalities and other governmental agencies have expanded into many new areas, either replacing private enterprises or satisfying new needs which heretofore had not required public activity. This expansion in the area of governmental activity has quite naturally been attended by an increasing number of private injuries resulting from municipal tortious conduct which, *under the older decisions*, would go without remedy. The availability of liability insurance has increased confidence in the ability of local government to carry on without special immunity. Concepts of fair play and justice have changed. Accordingly, courts have had to make new evaluations in the light of the common sense of the situation, and have increasingly declined to extend the concept of governmental immunity to new and growing areas of activity. (23 N. J., at pages 328-9)." (Emphasis added.)

This reference to the "older decisions" was New Jersey's rejection of the petitioner's *archaic approach*. It is interesting to note that the New Jersey courts have adopted the

so-called, New York line of decisions. This authority includes the Florida case of *Ide* v. *St. Cloud*, 150 Fla. 806, 8 So. 2d 924 (1942), where it was specifically held that the operation of a municipally owned bathing beach is a proprietary function. It also includes the New Mexico and Illinois cases entirely abolishing municipal immunity, all of which were adopted with approval by the New Jersey Supreme Court in *McAndrew* v. *Mularchuk*, 33 N. J. 172, 162 A. 2d 820 (1960). The law of Florida, the only other state in the nation whose municipalities engage in the commercial development, advertisement and presentation to the public of their bathing beach facilities to such an extent as does Atlantic City, are completely in accord with the holding of the trial court and the New Jersey cases.

In ruling as they did, the District Court and the Court of Appeals did precisely what was required under the doctrine of *Erie R. Co.* v. *Tompkins*, 304 U. S. 64 (1938). They approached the problem as would the New Jersey courts. Based upon the factually analogous situation in *Weeks* and the enlightening opinion therein, the courts below could come to no other conclusion under *Erie* and the modern New Jersey cases than to follow the trend away from the theory that the king can do no wrong and hold the municipality liable.

The Petitioner has placed heavy emphasis upon *Bisbing* v. *Asbury Park*, *supra*, and indicated that the courts below failed to adhere to this "controlling" case. That *Bisbing* should not have determined the case *sub judice* is clear for several reasons. First, that case is factually distinguishable. There, the public was not invited by mass communication media to flock to the grass plot on which the injury occurred. In fact, the court in *Bisbing* noted that persons were not supposed to walk upon the grass plot where the plaintiff fell. 80 N. J. L. at 421. However, in the case at

bar, just the reverse is true. A great deal of money was spent by Atlantic City to entice persons to use the municipal beach facilities with the hope that such patrons would contribute to Atlantic City's economic well-being. That this calculated program of inducement was successful is evidenced by the fact that one-half of Atlantic City's income is attributable to the presence of beach facilities (350a, 21-23). No such consideration was present in the *Bisbing* case. There the court concluded that the grass plot was completely disconnected with the income producing activities of the city. The court reasoned that there being no benefit to the city arising from the grass strip, there should be no detriment flowing from it. It was not inseparably linked to the multi-million dollar resort business of Asbury Park as is the Atlantic City beach. These factual distinctions alone are sufficient to affirm the holdings below as to the persuasiveness of *Bisbing*. However, other more justifying reasons exist.

Bisbing does not control the instant case for a second reason. The court there found that in addition to the lack of economic benefit, the city owed no duty to the public in constructing or maintaining the grass plot since it was a function gratuitously undertaken. This was precisely the basis upon which immunity was founded in the 1840 pilot case of *Strader, supra*, cited in *Bisbing* wherein the plaintiff's horse and buggy fell from a bridge due to the absence of abutments along the sides. This holding of immunity in the construction of bridges was overruled by statute in 1918. L. 1918, c. 185, sec. 1309, p. 609, R. S. 27:19-10 (N. J. S. A.).

A third reason for the proper refusal of the courts below to follow *Bisbing* and *Strader* is the statement of New Jersey's highest court in *Cloyes* v. *Delaware Township*, 23 N. J. 324, 129 A. 2d 1 (1957) that this line of cases based upon the "public duty" concept of *Strader*, is archaic and

"an approach of another time." The New Jersey Supreme Court went on to state ". . . we have travelled far from Strader . . ." 23 N. J. at 330, 129 A. 2d at 3. The Court concluded:

> "We are satisfied that movement toward Strader is in the wrong direction. Hence we confine our inquiry to the question whether the operation here conducted is proprietary within the holding of more recent authorities, *without regard to whether the result will jell with expressions which antedate them*" 23 N. J. at 332, 129 A. 2d at 5. (Emphasis added.)

The Petitioner argues here, as it did in both courts below, that the concept of immunity by the highest court of New Jersey should be reversed in favor of a return to principles and considerations which were born in an era when fear of municipal bankruptcy was a primary concern. The Petitioner would have this Court adopt the antiquated rationale of *Russell* v. *The Men of Devon*, 2 Term. Rep. 667, 100 Eng. Rep. 359 (K. B. 1788) wherein Judge Ashurst stated "that it is better that an individual should sustain an injury than that the public should suffer an inconvenience." 100 Eng. Rep. at 362. Clearly this is not the direction in which the New Jersey courts have moved. So firm was New Jersey's determination that a person suffering injury due to the negligence of a municipal corporation should have his due recovery that the courts perpetuated the judicially created dichotomy of governmental versus proprietary functions even after the New Jersey Legislature enacted L. 1933, c. 460, sec. 1, p. 1550, R. S. 40:9-2 (N. J. S. A.) which provides that:

> "No municipality or county shall be liable for injury to the person from the use of any public

> grounds, buildings or structures, any law to the contrary notwithstanding."

This statute was first construed in *Leeds* v. *Atlantic City*, 13 N. J. Misc. 868, 181 Atl. 892 (Cir. Ct. 1935), where the plaintiff was injured in Atlantic City's Convention Hall. The court in *Leeds*, as did the District Court below (55a, 11-22), held that the Legislature presumptively knew of the existing dichotomy and therefore did not intend to grant blanket immunity to the municipalities. The court concluded that in the operation of Convention Hall, the eastern entrance of which lies within the metes and bounds description of the beach and which fronts on the boardwalk, Atlantic City was engaged in a proprietary function and therefore not immune under the statute. What appears at first blush to be a conflict of rationale between the Legislature and the New Jersey courts, is dispelled by the fact that the Legislature never changed the statute despite repeated holdings that the act did not grant blanket immunity. Such acquiescence without change in New Jersey has been regarded as approval of the interpretation placed upon a statute by the courts. *State* v. *Joas*, 34 N. J. 179, 168 A. 2d 27 (1961). It should be noted that over a year has lapsed since the Judgment was entered in the District Court in the instant case, and the New Jersey Legislature has not changed the statute in any manner.

The fourth reason for the inapplicability of *Bisbing* is that the result was reached by analogy of the grass plot to public streets. At 80 N. J. L. 442, 78 Atl. 198, the court stated:

> "I conclude, therefore, that thus far there is no difference to be noted between an action brought by an individual to recover damages sustained for the non-repair of the ordinary public street and the circumstances surrounding the present action."

In 1910 when *Bisbing* was decided, municipalities were immune for negligent maintenance of public streets. However, this is no longer the law of New Jersey. *Hammond* v. *County of Monmouth*, 117 N. J. L. 11, 186 Atl. 452 (Sup. Ct. 1936). Thus the two concepts upon which *Bisbing* was decided, i. e., the "public duty" rule and the analogy to the public streets have long since disappeared from New Jersey jurisprudence. In view of this the courts below chose not to revitalize that which has been dead for many years but rather apply the more recent New Jersey concepts in the field of tort law. In so doing the courts below followed the wisdom of Mr. Justice Holmes' comments on "The Path of the Law" in *Collected Legal Papers*, Oliver Wendell Holmes. At p. 187, he stated:

> "It is revolting to have no better reason for a rule of law than it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since and the rule simply persists from blind limitation of the past."

The fifth reason for the inapplicability of *Bisbing* to this case is that the presence or absence of direct pecuniary profit to the municipality is no longer a valid test of the character of the function. It has been noted that one of the reasons for the immunity holding in *Bisbing* is that the city derived no economic benefit from the grass plot. The court at the same time indicated that the result would be different had the locale of the injury produced an economic advantage or benefit to the city. 80 N. J. L. at pp. 423, 424. This test of benefit versus detriment has been qualified by *Weeks* v. *City of Newark*, *supra*, at pages 176-177. There the plaintiff was injured when he slipped in the men's room. The court noted that in the overall operation of Newark's pools

the city sustained a net monetary loss of about $69,000.00 despite nearly a quarter of a million patrons. 62 N. J. Super. at 168, 162 A. 2d at 316. Although economic benefit is a suggested area of inquiry, it is no longer an indispensable requisite. In its stead was placed the query of whether the municipality derives a special advantage from the function. The record is replete with such indications in this case. (87a, 25-27; 91a, 37-92a, 10; 113a, 30-114a, 40; 355a, 41-48). Therefore, the trial court and the Court of Appeals had ample basis for deciding that the Atlantic City beach was proprietary and the city responsible for its negligence in accordance with New Jersey Law.

The final reason for the inapplicability for *Bisbing* is that the case did not construe the statute relied upon by the Petitioner. In its brief to the Court of Appeals the Petitioner made clear that its defense was grounded solely upon R. S. 40:9-2 (N. J. S. A.). (Petitioner's Brief p. 6, l. 10). The *Bisbing* decision predates the statute by more than 25 years and concerns itself with common law tort immunity only. The Petitioner's contention that the holding of *Bisbing* demands an equation of the Atlantic Beach with public grounds in the statute is not borne out by the case. It could not be because the concept of public grounds within the meaning of the statute was not before the court nor did the court have before it the decades of whittling away of municipal immunity with which the courts below were confronted. In following the *Erie* mandate, the District Court and the Court of Appeals had no choice but to follow the view which the Supreme Court of New Jersey would take, the same liberalizing view away from the dictates of another time. Thus, it would have been a violation of the duty imposed by *Erie*, had the lower courts given any persuasive effect to the inapplicable, eroded and outmoded case of *Bisbing* v. *Asbury Park*.

One of the few points on which the Petitioner and Respondent are in accord is the criterion laid down by *Bisbing* as to characterizing an activity as proprietary where the statute authorizing it is permissive. If that case has any life remaining after fifty years of a more enlightened approach, this one point is all that remains. Although not citing *Bisbing*, the court in *Stringfield* v. *Hackensack*, 68 N. J. Super. 38, 171 A. 2d 361 (App. Div. 1961) cert. denied, 36 N. J., 174 A. 2d 921 (1961) used the permissive-mandatory test to conclude that the operation of a public parking lot was a proprietary function.

The language of L. 1894, c. 93, Sec. 1, p. 146, R. S. 40:179-98 (N. J. S. A.) which authorized the operation of the beach by Atlantic City leaves no doubt that the authority was permissive in nature. The statute commences, "It shall be lawful for the common council or other governing body . . ." to operate a public bathing beach. This language is in direct contrast with the mandatory language of statutes, relating to public educational facilities, L. 1953, c. 417, sec. 1, p. 2089, R. S. 18:5-1.1 (N. J. S. A.) and public health programs, L. 1887, c. 68, secs. 9 & 10, pp. 83, 84 as amended L. 1951, c. 69, sec. 68, p. 457, R. S. 26:3-1 (N. J. S. A.). The Petitioner's act of obtaining title to the beach and exploiting its attractiveness was not undertaken at the command of the State of New Jersey as its agent and therefore under the test of *Stringfield* v. *Hackensack*, *supra*, the courts below properly found the operation of the beach to be a proprietary function.

The case of *Kuehler* v. *New Jersey & N. Y. R. Co.*, 104 N. J. L. 333, 140 Atl. 329 (E. & A. 1928) was heavily relied upon by the Petitioner in the courts below. However, that case also relied upon the "public duty" concept discussed *supra*. The Court specifically held that the municipality was not liable in tort because in maintaining the steps upon

which the plaintiff fell, it was performing a public duty, citing *Bisbing, supra* and implicitly adopting the rationale of *Strader, supra.* The severe criticism of this approach by the New Jersey Supreme Court in *Cloyes* v. *Delaware Township, supra,* applies with equal vigor to the *Kuchler* case.

It is respectfully submitted that the courts below correctly ascertained and applied the state law which led to the conclusion that the operation of the beach was a proprietary activity and therefore the Writ of Certiorari should be denied.

POINT II.

The writ should be denied because there is no conflict among the circuits in the application of the rule of *Erie R. Co.* v. *Tompkins.*

In an effort to have this Court grant certiorari the petitioner has alleged a conflict among circuits as to the application of *Erie* which has led to confusion in the lower courts. This allegation does not find sufficient support in the petitioner's brief to invoke the appellate jurisdiction of this Court because no such conflict is shown by petitioner's argument in Point II of its Petition nor the cases cited therein.

Meredith v. *Winter Haven,* 320 U. S. 228 (1943) left little doubt that regardless of the difficulty of the question of state law, the lower federal courts must cope with the issue and ascertain state law "with the aid of such light as was afforded by the materials for decision at hand . . ." 320 U. S. at 238. None of the cases cited by the petitioner demonstrate that the lower Courts violated this rule nor

do they demonstrate any conflict among the circuits in its application.

At pages 13 and 14 of its Petition, Atlantic City has quoted two statements from the 2nd Circuit and the 5th Circuit, respectively, which at first glance appear at odds. Little more than superficial analysis is required to display that the quotations are tempered by the divergent facts of each case. In *Cooper* v. *American Airlines, Inc.*, 14 F. 2d 355 (2nd Cir. 1945) the Court of Appeals found that a 1935 New York case was not controlling because of the serious doubt cast upon its validity by a subsequent holding of New York's highest court. Faced with an obviously new line of reasoning by the New York court of last resort, the 2nd Circuit could do nothing else but follow the lead of the State Court.

In *Polk County, Georgia* v. *Lincoln Nat'l. Life Ins. Co.*, 262 F. 2d 486 (5th Cir. 1959) the Court of Appeals had a vastly different problem before it. A state case over thirty years old clearly covered and decided the same issue of law facing the Court of Appeals. Although apparently disagreeing with the case, the 5th Circuit could not overcome it nor would it expand Judge Frank's approach in *Cooper*, *supra*. That the two cases are not irreconcilable is evidenced by Judge Jones' statement of a principle completely in accord with the views of Judge Frank. Judge Jones ruled:

> "It is the law of Georgia that governs and under the Conformity Act and Erie R. Co. *v.* Tompkins, 304. U. S. 64, 58 S. Ct. 817, 82 L. ed. 1188, this Court is required to determine, *as best it can*, what that law is with respect to the undisputed facts of the case." (Emphasis added.)

He then continued:

> "'A decision of the state court must be on the precise point in controversy in the federal court in order to have binding effect as a precedent therein, but the federal court has the duty, where a *direct* expression by the state court is lacking, to have regard to *any* persuasive data available, such as compelling inferences or logical implications from other related adjudications.'"

Only a strained reading of these two cases will lead to the conclusion that they are in conflict with each other. In an effort to come within the confines of Rule 19, 1(b) the petitioner has also introduced the same strain between *Mason* v. *American Emery Wheel Works*, 241 F. 2d 906 (1st Cir. 1957) cert. denied 355 U. S. 815 (1957) and *Nolan* v. *Transocean Air Lines*, 290 F. 2d 904 (2d Cir. 1961) cert. denied 365 U. S. 293 (1961). In *Mason* the plaintiff brought a personal injury action against a Rhode Island Corporation for the negligent manufacture of an emery wheel. The District Court felt itself bound by a 1928 Mississippi case holding that privity of contract was necessary to bring such an action. The Court of Appeals noted that a recent opinion of the Mississippi Supreme Court gave strong indication that it was moving away from the old, harsh concept, just as did the New Jersey courts in *Clones*, *supra*, and *Weeks*, *supra*. Judge Magruder then stated:

> "Of course it is not necessary that a case be explicitly overruled in order to lose its persuasive force as an indication of what the law is. A decision may become so overloaded with illogical exceptions that by erosion of time it may lose its persuasive or binding force even in the inferior courts of the same jurisdiction." 241 F. 2d at 909.

Judge Magruder also noted that in its most recent decision on the privity question, the Mississippi Supreme Court did not come to grips with the stagnant approach of yesteryear but it observed the abolition of privity in many jurisdictions and alluded to it as the "modern doctrine". Judge Magruder concluded that the Mississippi Supreme Court was prepared to reconsider and revise the harsh rule it had previously announced and therefore the Court of Appeals was not bound by the 1928 decision and could act as it believed the state court would have acted. On appeal to this Court, the Petition for Writ of Certiorari was denied.

The *Nolan* case, *supra*, is not at odds with any of the cases mentioned thus far. There a wrongful death action was dismissed by the District Court as being barred by the California statute of limitations. The Court of Appeals affirmed and was directed by this Court to reconsider its opinion in light of a new California case not previously considered and to "decide what relative weights, as authoritative sources for ascertaining California law the New York Court of Appeals would accord to the Sears-Haro line . . . and to Leeper . . ."; Leeper being the new case on point 290 F. 2d at 905. On its *de novo* examination of the issue the 2nd Circuit specifically referred to Judge Frank's approach in *Cooper, supra*, and rightfully so, considering that such an approach was directed by this Court. The Court of Appeals again affirmed the dismissal and on appeal to this Court a second time, certiorari was denied. 365 U. S. 293 (1961).

The same absence of conflict is even more apparent in the other cases cited by petitioner. Furthermore, this Court has leaned toward the approach of Judge Frank in still another case. In *Ruhlin* v. *New York Life Ins. Co.*, 304 U. S. 202 (1938) a Writ of Certiorari was granted prior to

the annunciation of the decision in *Erie*. Mr. Justice Reed stated that the writ might not have been granted had *Erie* been decided earlier. In referring to the role of the federal courts after *Erie* he stated:

> "As to questions controlled by state law, however, conflict among the circuits is not of itself a reason for granting a writ of certiorari." 304 U. S. at 505-506.
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> "The parties and the federal courts must now search for and apply the entire body of substantive law governing the identical action in the state courts. . . . Now they must merely broaden their inquiry to include the decisions of the state courts, just as they would in a case tried in the state court. . . ."

That the circuits are not in conflict and burdened by confusion as petitioner contends is clear from the foregoing discussion. The standard of their conduct has been set forth by this Court and that standard was adhered to precisely by Judge Cohen. Indeed, he set forth a very precise understanding of his duty. He stated:

> "In such actions, as here, the Federal District Court is but another forum of the state courts and is compelled to make such determination as would a state court on the precise issue presented to it. Its function is not to speculate as what the law will be in the future, or apply a rule of law which it considers better or wiser." Petitioner's Appendix B, pp. 36-37.

It is urged that the courts below decided the present case in strict conformity with the *Erie* mandate and that the decision here rendered by the Court of Appeals in no way conflicts with the views of other circuits.

POINT III.

The decisions of the Courts below involved interpretations of local tort law which should not be reviewed by the Supreme Court of the United States.

Following the *Erie* mandate the trial judge decided that Atlantic City's activities were proprietary and therefore the city was liable in tort under the New Jersey law. On appeal to the Court of Appeals for the 3rd Circuit the Petitioner argued the same thing it now contends, namely, error in the application of *Erie*. Under such circumstances, what is the function of the Court of Appeals? It is to determine whether the trial judge correctly ascertained the state law and applied it. So convinced was the 3rd Circuit that the trial court correctly ascertained the appropriate law that it affirmed Judge Cohen's decision *per curiam* without opinion of its own. It also made the unusual complimentary remarks that the Judgment was "affirmed for the reasons so well stated by Judge Cohen in his excellent opinion. . . ." In its appeal to the Court of Appeals, the Petitioner argued nothing more than what is stated in its Petition for certiorari. All legal postulates being the same, what then is the function of this Court on Petition for Writ of Certiorari? As stated in Rule 19 this Court must decide, as a discretionary matter, whether to hear the merits of this common law personal injury action arising out of an accident on a local New Jersey beach. In arriving at such a decision this Court must decide whether the Court of Appeals

> "has rendered a decision in conflict with the decision of another court of appeals on the same matter; or has decided an important state or territorial ques-

> tion in a way in conflict with applicable state or territorial law; . . . or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this court's power of supervision." Rule 19, 1(b).

The Respondent respectfully submits that the instant case does not merit review by this Court of the findings as to New Jersey law. The cases decided by this Court evincing its steadfast refusal to intervene in cases where the lower federal courts have made findings of local law are legion. On questions of local law, this Court has always paid great deference to the views of the judges of the lower federal courts. *Hillsborough* v. *Cromwell*, 326 U. S. 620 (1945); *Steel* v. *General Mills, Inc.*, 329 U. S. 433 (1946); *Gardner* v. *New Jersey*, 329 U. S. 565 (1946); *Huddleston* v. *Dwyer*, 322 U. S. 232 (1943); *District of Columbia* v. *Pace*, 320 U. S. 698 (1943); *Skelly Oil Co.* v. *Phillips Petroleum Co.*, 399 U. S. 667 (1949); *Williams* v. *United States*, 341 U. S. 97 (1950); *General Box Co.* v. *United States*, 351 U. S. 159 (1955); *Sims* v. *United States*, 359 U. S. 108 (1959); *Rogan* v. *Merchants Transfer & Warehouse Co.*, 337 U. S. 530 (1949); *Richards* v. *United States*, 369 U. S. 1 (1962); *United States* v. *Durham Lumber Co.*, 363 U. S. 522 (1960). The rule against review of matters concerning findings of local law is even more vigorously applied where, as in the case at bar, the Court of Appeals and the District Court have reached the same findings. *Appalachian Power Co.* v. *American Institute of Certified Public Accountants*, ... U. S. ..... 80 S. Ct. 16, 4 L. ed 2d 30 (1959).

This Court's refusal to review on Certiorari has been particularly strong where the decision below is rendered by a judge of long experience in the jurisprudence of the state

whose law is being ascertained. In *Helvering* v. *Stuart*, 317 U. S. 154 (1942) the Court of Appeals held Illinois trust law controlled the extent of power of trustees and such power was not sufficient to bring trust income within the Internal Revenue Code so as to make it taxable to the trustees. Mr. Justice Reed stated:

> "This conclusion does not spring from a statute of that state nor even from a clear or satisfying line of decisions. It is, however, the reasoned judgment of the circuit which includes Illinois in which a judge of long experience in the jurisprudence of that state participated. Without a definite conviction of error in the conclusion, this Court will not reverse that judgment.
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> "If reasonably avoidable we should certainly avoid becoming a Court of first instance for the determination of the varied rules of local law prevailing in the forty-eight states." 317 U. S. at 163-164.

To the same effect is *Bernhardt* v. *Polygraphic Co.*, 350 U. S. 198 (1956) which held that special weight is given by this Court to a federal judge's statement of what the law of the state is, where the judge is from the bar of that state. Cf. *Thompson* v. *Consolidated Gas Utilities Corp.*, 300 U. S. 55 (1936) wherein Mr. Justice Brandeis stated:

> "We are always reluctant to pass upon a seriously controverted question of the meaning of a state statute, (in the instant case, state decisions) because our decision, although disposing of the particular case, cannot settle the issue of the proper construction of the statute . . . when not instructed by some decision of a state court, we are disposed, in exercising appellate jurisdiction, to accept the construction given by the lower federal court to a statute of the State, par-

> ticularly when the court is composed, as in this instance, wholly of citizens of the state, familiar with the history of the statute, the local conditions to which it applies, and the character of the State's laws." 300 U. S. at 74-75. (Parenthesis added.)

The above cases are not cited for the proposition that under no circumstances may this Court grant certiorari where a question of local law is concerned. The standard by which the decision below is determined has been enunciated in several opinions of this Court. In *Francis* v. *Southern P. Co.*, 333 U. S. 445 (1947) it was held that a plain showing of error is required for this Court to review lower federal courts in their application of the rule of *Erie*, that in diversity cases federal courts are to apply state law. *Vide*, *Palmer* v. *Hoffman*, 318 U. S. 109, rehearing denied 318 U. S. 800 (1943) a diversity case which involved a railroad grade crossing accident in Massachusetts. The District Court rendered a judgment for the plaintiff which was affirmed by the Court of Appeals with one dissent. The Petitioner argued that the courts below incorrectly applied the Massachusetts statute regarding the burden of proof of contributory negligence. Speaking of the findings below as to the interpretation of the statute, this Court stated:

> "The propriety of applying the rule of the Fitzpatrick case to the cause of action based on the Massachusetts statute may be arguable. But it is not the type of ruling under *Erie R. Co* v. *Tompkins*, 304 U. S. 64, 82 L. ed. 1188, 114 A. L. R. 1487, 58 S. Ct. 817 (1937) which we will readily disturb. Where the lower federal courts are applying local law, we will not set aside their ruling except upon a plain showing of error." 318 U. S. at 118.

In *Spiegel* v. *Commissioner*, 335 U. S. 701 (1948) it was held that a decision of a Court of Appeals as to the law of

a state included within the circuit will be left undisturbed where reasonable arguments can be made based on state cases to support the findings below. Also holding that, if not unreasonable or not clearly erroneous, the decisions of the lower courts will not be reviewed on issues of local law, are *Propper* v. *Clark*, 337 U. S. 472 (1948); *United New York & N. J. S. L. P. Asso.* v. *Halecki*, 358 U. S. 613 (1959) and *United States* v. *Durham Lumber Co., supra.*

On the basis of the foregoing authority the Respondent respectfully urges that the Petitioner has failed to support the burden of persuasion necessary for the issue of a Writ of Certiorari. Doubtless, there has been no plain showing of error by the courts below nor have their findings been shown by the Petitioner to be unreasonable. At best, although not conceding the point, the Petitioner has shown that the lower courts were presented with two divergent lines of authority, one ancient and outmoded, the other recent and in accordance with the movement away from municipal immunity as announced by the New Jersey Supreme Court. Thus, the applicability of the cases relied upon by the Petitioner were no more than arguable. However, as the *Palmer* case, *supra*, indicates, this Court will not disturb the findings below on such a presentation by the moving party, especially in a case involving a simple provincial issue, as here. If, after considering the presentation of the Petitioner, there remains any question as to the applicability of the line of authority espoused by it, the Petition should be denied. Such was the mandate of this Court in *Henderson Co.* v. *Thompson*, 300 U. S. 258 (1936) wherein the plaintiff attacked the validity of a Texas statute prohibiting the use of sweet natural gas for the manufacture of carbon black which was enacted after contracts for such use were entered into. The plaintiff contended

that the statute violated the freedom of contract clause of the Texas Constitution. The complaint to enjoin the enforcement of the statute was dismissed by the District Court. Mr. Justice Brandeis, speaking for this Court, found that there was no Texas case on point which was dispositive of the issue although there was an analogous case. He stated:

> "If we felt any doubts as to its application here (of the analogous case) in the absence of a definite construction of the Constitution of the State by its highest court, we should defer to the Federal Court's understanding of the state law." 300 U. S. at 266.

The opinions cited above make clear the reluctance of this Court to grant certiorari where a question of local law has been resolved by a District Court judge from the state whose law is being applied and affirmed without dissent by the Court of Appeals on the opinion of the trial judge. Therefore, it is respectfully submitted that the Petition for Writ of Certiorari should also be denied on this ground.

In addition to the fact that this case involves only a provincial issue, the very nature of the case demands denial of the Petition. As early as 1892 this Court recognized that a local personal injury action did not merit review by the nation's highest tribunal. In the case of *In re Woods*, 143 U. S. 202 (1892) the Circuit Court of Appeals held that the Minnesota rule precluding a servant from recovering from his master for personal injury due to the negligence of a fellow servant, was inapplicable to the facts. In considering the defendant's Petition for Writ of Certiorari this Court held that only where questions of gravity and importance were involved would review be granted.

> "This must necessarily be so in any view, and especially so when it is considered that the Circuit

> Courts of Appeals were created for the purpose of relieving this Court of the oppressive burden of general litigation which impeded the examination and disposition of cases of public concern. . . .
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> "But we do not regard the inquiry as to whether . . . the law in respect of recovery by a servant against his master for injury received in the course of his employment was properly applied on the trial of this case, as falling within the category of questions of such gravity and general importance as to require the review of the conclusions of the Circuit Court of Appeals in reference to them." 143 U. S. at 205, 206.

This Court thereupon denied the Petition. So also should be the result of the instant case since the issue is not one of gravity or general public importance.

Conclusion.

For the reasons heretofore stated it is urged that the Petition for Writ of Certiorari should be denied.

Respectfully submitted.

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